
R E P O R T S
OF
SIR GEORGE CROKE, KNIGHT,
OF
S E L E C T C A S E S

ADJUDGED IN THE
COURTS of KING's-BENCH and COMMON-PLEAS,
IN THE REIGNS OF
QUEEN ELIZABETH, KING JAMES, and KING CHARLES I.
IN THREE VOLUMES.

VOLUME THE FIRST—PART THE FIRST,
FROM THE
TWENTY-FOURTH TO THE THIRTY-EIGHTH YEAR
OF
QUEEN ELIZABETH.

WE, all knowing the great learning, wisdom, and integrity of the Author, do, for the common good, allow and approve the publishing of this book, in the same letter and dialect as now is printed.

Robert Foster.

Orl. Bridgman.

Matthew Hale.

Thomas Malet.



Robert Hyde.

Edward Atkins.

Thomas Twisden.

Thomas Tyrrill.

Chr. Turner.

Samuel Browne.

Wad. Wyndham.

25 d 8
R E P O R T S
O F
SIR GEORGE CROKE, KNIGHT,
FORMERLY ONE OF THE
J U S T I C E S
O F T H E
COURTS of KING's-BENCH and COMMON-PLEAS,
O F S U C H
S E L E C T C A S E S
AS WERE ADJUDGED IN THE SAID COURTS DURING THE
REIGN of QUEEN ELIZABETH.

COLLECTED AND WRITTEN IN FRENCH,

By H I M S E L F;

REVISED AND PUBLISHED IN ENGLISH,

By SIR HARBOTTLE GRIMSTON, BARONET,
MASTER OF THE ROLLS.

THE FOURTH EDITION, CORRECTED,
WITH
MARGINAL NOTES and REFERENCES to the LATER REPORTS,
AND OTHER BOOKS OF AUTHORITY,

By THOMAS LEACH, Esq.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

L O N D O N :
PRINTED FOR E. AND R. BROOKE, BELL-YARD, TEMPLE-BAR;
AND T. WHIELDON, FLEET-STREET.

M,DCC,XC.

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R E P O R T S

SIR GEORGE CLOKE, KNIGHT,

J U S T I C E S

OF THE

S E L E C T C A S E S

IN THE

H I S T O R Y



THE

M A G I S T R A T E S

OF THE

C O U R T

OF THE

L O R D S

OF THE

OF THE

OF THE

TO THE
KING's MOST EXCELLENT MAJESTY,
CHARLES THE SECOND,

BY THE GRACE OF GOD,

KING of GREAT-BRITAIN, FRANCE, and IRELAND,
DEFENDER of the FAITH, &c.

MOST GRACIOUS SOVEREIGN,

WITH that duty and humility which becomes a loyal and obedient subject, I offer up to your royal patronage the learned works of a prudent, grave, and pious Judge; the author deceased and now with God. When he left the world, he left with me these precious fruits of his travel in the common laws of *England*; and it hath been my care to send them abroad for the public good. It was first in my purpose to dedicate them to your sacred majesty; the grand *MECÆNAS* of the common law; assuring myself, the usefulness to be such, and your majesty's disposition so princely, that you would not deny to receive them with a gracious hand. But unhappily hindered of my purpose, to mine unspeakable grief, by the extreme difficulty of public address to your majesty's sacred person, divided from your good subjects by the cruel, wicked, bloody, and desperate practices of horrid intruders and usurpers, inforced to yield to the necessity of the times, I sent forth the two former works of this eminent Judge, with a Preface only, to encourage gentlemen in the study of that law; which I conceived was the best way, not only to evidence your majesty's most just, undoubted, and hereditary right to your three imperial crowns, of your now again famous and flourishing kingdoms; but likewise to restore your majesty to your prerogative royal, and to give you that supremacy which is due to your sovereign authority.

THE EPISTLE DEDICATORY.

And now those black and bloody clouds are happily dispelled by the miraculous brightness of your majesty's presence, to whom should I dedicate the works of this learned Judge but to your royal goodness, to whose service I have devoted my tongue, my pen, my heart, and all the offices of my life; and upon whom not only the eyes, and hearts, and hopes of all your own loyal subjects (delighted to see the moderation of your government), but of all the protestant world, are fixed (as the true heir and real inheritor of your royal father's graces and virtues, our late king of ever-blessed memory, and now most glorious saint and martyr); whose divine and heavenly instructions, together with the gifts of nature and grace, wherewith God hath richly stored your princely mind, calls you to great matters, and promiseth great effects, and fills with great hopes all those that fear God; who esteem you as a plant of God's own setting, which he dresth with his own hand, watereth with his grace, and daily fructifieth to his glory.

ROYAL SIR, the restitution and preservation of the law, justice, government, and the happy policy of our civil state, next under God, is due to yourself; being to this nation another CHARLEMAINE. For as it was his impress upon the reverse of his coin, "*decem preceptorum custos*" "*Carolus magnus*," so may it truly, next under "*defensor*" "*fidei*," be engraven upon the circle of your crown, "*Legis Anglicanæ Custos Carolus secundus*."

Which law of *England* is nothing else but an artificial perfection of reason; and therefore my LORD COKE tells us, "If all the reason that is dispersed into so many several heads were united into one, yet he could not make such a law as the law of *England* is; because by many succession of ages, it hath been fined and refined by an infinite number of grave and wise men, as now by the learned labours of this reverend Judge; and by long experience is grown to such perfection for the government of this realm, as the old rule may justly be verified of it, "*Neminem oportet esse sapientiores legibus*;" No man out of his own private reason ought to be wiser than the law, which is the perfection of reason (a)."

Neither is this law for prince and people only as they be in a body politic, but also for the singular benefit of the church

THE EPISTLE DEDICATORY.

church of God, the rights and liberties whereof the common law maintaineth inviolably; being, as Judge *Fortescue* defineth the same, “ *Sanctio sancta jubens honesta, prohibens que contraria (b)*. The same in effect which *Cicero* saith in his second book *DE NATURA DEORUM*, *Lex est recti præceptio, pravi est depulsio*. Wherefore religion and the law do stand together, do mutually uphold each other, and are concentered in their original and end; they both come from God, and tend to God. And as religion, so the law was given, *ut cives faciat bonos*, saith the philosopher; and therefore the law in a christian state is not only convenient, but necessary, that no state can stand and flourish without it. Hence it is, that where religion doth find a due regard, a conscientious practice, and the law a willing submission, and a cheerful obedience; there, if anywhere in the world, the prince will be glorious, and the people happy.

(b) De Laudibus Legum Angliz, chap. 3.

EXCELLENT SOVEREIGN,

YOUR weighty affairs do call me off, and command brevity. I will yield obedience in both, but must first humbly crave your pardon in using your most illustrious name in the dedication of these books. It hath been no unusual thing to dedicate to kings the writings of famous men; nor will it be inglorious to your highness to vouchsafe *these* your patronage: for whilst you countenance worth and worthy men, your virtue will contend with your fortune, and your goodness bear up an equal balance with your greatness; and then shall the deceased author, in these deserving works of his, live before you, who for his mere merits was made a Judge of this realm by your royal father, according to that ancient and honourable rule and way of law preferment mentioned by *FLETA*, *nec prece, nec pretio, nec premio*: and having skilfully and faithfully served in that place above sixteen years, and, by his exceeding care and pains in that service, worn out his weak and aged body, humbly petitioned his majesty, that he might render up the office he gave him, and wholly retire into the country.

To which petition, your majesty's royal father gave a most gracious answer, mentioned at large in my Preface to

THE EPISTLE DEDICATORY.

the Third Part (a) of this worthy Judge's Reports, though first printed, which cannot be expressed but in his own words, without injury to his incomparable style, *viz.* "to the
 " end all our loving subjects, who have and shall faithfully serve us (as we declare this our servant hath
 " done), may know, that as we shall never expect, much
 " less require or exact from them performances beyond
 " what their healths and years shall enable them; so we
 " shall not dismiss them without an approbation of
 " their service, when we shall find they deserve it, much
 " less expose them in their old age to neglect, &c."—
 And thereupon he continued him still Judge of the king's bench, and gave him the like allowance and fee he paid to the rest of the Judges, till a *certiorari* came from the great Judge of heaven and earth, to remove him from a human bench of law to a heavenly throne of glory.

And now I beseech your majesty, as the just payment of a due debt to the honourable ashes of this worthy Judge, my dear father-in-law; and as the earnest of a far greater, to the father of our country, your sacred majesty; to accept this poor oblation from the heart and hands of him, who makes it his daily prayers, that you may live long, and triumphantly reign; and that your SCEPTRE may, like AARON'S ROD, bud and blossom, and be an eternal testimony against all rebels,

Your Majesty's

Most loyal Subject,

And obedient Servant,

HARBOTTLE GRIMSTON,

(a) These Reports were originally published in the inverted order of the reigns of *Elizabeth, James, and Charles*; and they were accordingly distinguished by cotemporary authors in that order of publication, by 1. 2. and 3. Croke; but they were entitled by the original editor, and are here referred to by him, in the proper order of the several reigns, which is now become the more usual mode of quoting them; but perhaps, more properly by their respective titles of *Croke Elizabeth, Croke James, Croke Charles*; which is the mode of reference adopted by the present editor.

P R E F A C E

TO THE FOURTH EDITION.

THE attention of the Editor, in preparing the present edition of SIR GEORGE CROKE'S REPORTS for the press, has been confined to the following alterations :

THE TEXT, which in many places was unintelligibly faulty, has been cautiously corrected, by an attentive and careful collation of the last edition with the former editions.

THE POINTS OF LAW, each independent of, and different from the other, which were frequently crowded together in succession in the same Case, have been separated and detached by BREAKS wherever the spaces of the page would afford the opportunity ; by which means its appearance is rendered less confused, and the several points of law made distinguishable at first view.

AN ABSTRACT, containing the substance of each Case, has been drawn out into the margin, accompanied by references to all those Cases in the same book which relate to the subject of it.

THE MARGINAL REFERENCES of the last edition have been examined, and those which were found inapplicable are expunged.

P R E F A C E.

To these corrected references have been added, a new and numerous selection of references to all the subsequent Reporters from the reign of Charles the Second to the present time, and to such treatises on particular subjects of law as have been distinguished by their merit and authenticity.

THE STATUTES by which any parliamentary alterations have been made in the law since the publication of the last edition, are cited at the bottom of each Case.

AMONG the notes and references will be distinguished several which were made from the manuscript of the late LORD CHIEF BARON PARKER, in a copy of this work, which has been communicated to the Editor for this purpose.

THE EDITOR takes this opportunity to assure those gentlemen whose frequent correspondence has flattered him by a discovery of their impatience for the publication of this work, that the long delay has not been occasioned by any neglect on his part, but has arisen from many difficulties, which it was impossible to foresee or prevent, in passing the work through the press.

THE succeeding Volumes of Cases in the reigns of James the First and Charles the Second are in great forwardness, and will be published as soon as possible.

INDEX

TO THE
STUDENTS
OF THE
COMMON LAWS
OF
ENGLAND*.

“REASON is the life of the law,” saith that grave father and sage thereof, SIR EDWARD COKE. “Nay, the common law itself is nothing but learned reason, or the perfection of reason, gotten by much study and observation; which, by many succession of ages, hath been fined and refined by an infinite number of grave and learned men; and by long experience grown to such a perfection for the government of this realm, as the old rule may be justly verified of it; *No man of his own private reason ought to be wiser than the law* (a). “This law,” as saith the same author, “consisteth of three parts.—FIRST, On reports and judicial records.—SECONDLY, On statutes contained in acts and records of parliament.—AND THIRDLY, On the common customs of the realm, grounded upon reason, and used time out of mind, &c.”

(a) Co. Lit. 97. b.
See also 394. b.

The construction and explanation of all which belongs to the Judges of the realm (b). For though the law is the rule, yet in itself it is but mute; THE JUDGE is *lex loquens*, whose judgments and reasons given in court, lest they should vanish with the breath that uttered them, or being written in the memory of the hearers only, should be more frail and fluid than human nature itself; the wisdom of our former kings appointed four Reporters, to commit to writing, and truly to deliver, as well the words spoken, as the judgments and reasons thereupon given in our courts at *Westminster*. They were chosen men, and conferred all together at the

(b) Coke Inst. 344. a. *Optima legum et consuetudinis interpret est res perpetua similiter iudicata*, Coke Inst. 130. a. Plowd. Prologue to his Commentaries. Coke Preface to the Third Report, pag. 7. Hobert Rep. fol. 232.

* This Preface was originally affixed to *Croke Charles*.

T H E P R E F A C E.

making and setting forth any book of Reports; which book, in respect of the number of the Reporters and their approved learning, carried great credit, "as justly it deserved," saith *Mr. Plowden*. Hence it is that all our Year Books of Law-reports, from the beginning of the reign of king *Edward* the third until the latter end of king *Henry* the eighth, received their being, and continue their repute with us to this present. If we have since failed in the number of the persons reporting, it hath been amply recompensed in the grandeur and authority of one single author, *SIR JAMES DYER*, *Chief Justice of the common pleas*, by whose great learning, and assiduous study, the said judgments and law resolutions have been transmitted and perpetuated until the twenty-fourth year of the reign of the late queen *Elizabeth*; since when there hath not been any continuation or dependance of term or time in the *Lord Coke's* Reports, or in any other approved law-author to this present, whereby a constant series or diary of our law resolutions in our courts at *Westminster*, might have been propagated unto us; by which *interstitium*, in these licentious times, *non tam rescripta et judicium scita, quam propudia et severioris literaturæ impropria immodicè scaturiunt*. A multitude of flying Reports (whose authors are as uncertain as the times when taken; and the causes and reasons of the judgments as obscure, as by whom judged) have of late surreptitiously crept forth; whereby instead of that plentiful and profitable increase, which those fields, thus by a vigilant husbandman tilled, would have yielded to our students; we have been entertained with barren and unwarranted products, *infelix lolium et steriles avenæ*; which not only tends to the depraving the first grounds and reason of our students at the common law; and the young practitioners thereof, who by such false lights are misled, and thereby their clients causes either delayed or miscarried, and multiplicity of law-suits rather cherished than suppressed; but also to the contempt of our common law itself, and of divers our former grave and learned Justices and professors thereof; whose honoured and reverend names have, in some of the said books, been abused and invoked to patronise the indigested crudities of those plagiaries; the wisdom, gravity, and justice of our present Justices not deeming nor deigning them the least approbation or countenance in any their courts; pursuing therein the judgement and practice of the reverend *SIR HENRY HOBART*, who, when *Serjeant Henden*, *Termin. Mich. 20. Jac.* at the
common

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common pleas bar, in *Godfrey Wade's Case*, vouched for authority DALISON's *printed Reports*, demanded of him by what warrant those reports of DALISON's came in print.

Having therefore many, or rather one continued fifty years work by me, of the summary Reports or Commentaries of that grave, pious, and learned Justice, SIR GEORGE CROKE, KNT. which he began about the time when the *Lord Dyer* ended his Reports, and is uninterruptedly continued by him (our author) until near his decease; and not willing to deprive this present age or posterity of so much good; fearing also lest after my decease they should be obtruded to the public by an in curious law hand, or, through fordid ignorance of some others, be prostituted in the contemptible *pamphlet-dress* and character of such their blind and mishapen Reports (*dignum patella operculum*), as some of our late Justices and professors of law are in that kind abused (a); whereby the very majesty of the law is prophaned, the authority of Reports lessened, and the matters in their books rendered less useful to our students; I have taken upon me the resolution and task of extracting and extricating these Reports out of their dark originals; they being written in so small and close an hand, that I may truly say they are *folia sybillina*, as difficult as excellent; and have thereunto added the several Tables and Indexes of the names of the Cases, and the chief matters therein contained. I would have sent them forth in their native idiom, the proper and peculiar phrase of our common law, wherein they are succinctly, sensibly, and fully reported; "there being many words in them so appropriated, as that they cannot be so legally expressed by any other word, or by any periphrasis or circumlocution (b)," if not otherwise by present authority inhibited. In regard the whole work is too voluminous to be comprised in one book, I have, according to the ancient method observed in our Law Reports, reduced them to the number of our kings and queen in whose reign taken; and as well in observance of the advice of the *Lord Coke* to the students of our common law, "that they should first read the later Reports, because for the most part the later resolutions and judgments are the surest, and therefore best to season them therewith at the beginning, both for the settling of their judgments, and retaining them in memory; and

(b) Co. Lit. 9. a.
Co. lib. 4. 39. b.

(a) There be certain legal formalities and ceremonies peculiarly appropriated and antiently continued amongst us; so as they seem now to be essentials of the law itself, and ought not without the supreme authority be changed or disused: such are those which are observed by our author in the creation of serjeants at law, &c. And such I conceive are the writing of the orders and records of courts in such peculiar hands, the printing of Law Reports in their proper letter and native language.

THE PREFACE.

(a) Co. Lit.
249. b.

Tacitus in vita
Julii Agric.

“ are easier to be understood than the antient (a);” as also for that I would in a seasonable time *provocare ad vivos*, upon Tacitus’ grounds, and not improperly in his own words, it being now, “ *ultra quindecim annos (grande mortalis ævi spatium) in quibus multi fortuitis casibus interciderunt; pauci, et ut ita dixerim, non modò aliorum, sed etiam nostri superstites sumus, exemptis è mediâ vitâ tot annis, quibus juvenes ad senectutem, senes prope ad ipsos exactæ ætatis termines per silentium venimus.*”—‘ Above fifteen years (a great part of man’s age) wherein many have been wasted by usual chances, a few of us only remaining, that have over-lived, as I may say, not only others, but also ourselves, so many years subducted out of the midst of our life, in which we proceeded in silence from young men to aged, from aged almost to the grave.’—In which space, the chiefest both at bench and bar have been taken from us by death; some few only, who were then *antesignani* with them, and now *primi cerii in foro nostro Westmonasteriensis* remaining alive with myself (who for the greatest part of the time in taking these Reports, had the honour to be at the feet of this *Gamaliel*), whom I may vouch to attest with me the candour and integrity of our author, as well upon the bench, as in writing this work; wherein he never sought to draw to himself the glory of any argument or opinion delivered by another, but, were he at the bar or bench, hath faithfully set down his said judgment or opinion, and yielded him his due commendation. I have therefore first published the last part of his Reports, consisting of such choice judgments and resolutions only, wherein himself was both Judge and relator; who, without ostentation, might have fitly applied that of SYRACIDES unto himself: “ *Ego ultimus evigilavi, tanquam is qui spicas legit post messores; profeci benedictione domini, et tanquam vindemiator, implevi torcularis lacum: considerate, me mibi non soli laborasse, sed omnibus querentibus eruditionem.*”—‘ I am awaked up last of all, as one that gathereth after them in the vintage; in the blessing of the Lord I am increased, and have filled my wine-press like a grape-gatherer; behold, I have not laboured for myself alone, but for all them that seek knowledge.’—To whose worthy memory I think myself obliged, *prælibaminis loco aliquid parentari.*

Ecclesiasticus
cap. xxxiii. v. 15
& 16.

This reverend judge SIR GEORGE CROKE was descended of an ancient and illustrious family called LE BLOUNT. His ancestor in the time of the civil dissension betwixt York and Lancaster (as Justice Markham, taking part with king Edward the fourth, was relegated during the reign of king Henry the sixth; and as JUSTICE FORTESCUE, siding with

Henry

THE PREFACE.

Henry the sixth, absented himself in the time of king *Edward* the fourth, so), being a fautor and assistant unto the house of *Lancaster*, was inforced to subduſt and conceal himself under the name of *Croke*, till ſuch time as king *Henry* the ſeventh moſt happily reconciling thoſe different titles, this our ancestor in his *poſtliminium*, aſſuming his ancient name, wrote himſelf *CROKE alias BLOUNT* (that of *Blount* being altogether omitted by our Judge's father upon the marriage of his ſon and heir *Sir John Croke* with the daughter of *Sir Michael Blount* of *Maple-Durham* in the county of *Oxon*). This *CROKE alias BLOUNT* had iſſue *Sir John Croke* (grandfather to our Judge), who, being a fix-clerk in chancery, was reſtrained marrying, until enabled by the ſtatute of 14. *Hen.* 8. and being in much favour with the king, was by him made one of the maſters of chancery. He took to wife the daughter of *Sir Ambroſe Cave* of *Leiceſtershire*, Knight, by whom he had iſſue *Sir John Croke* of *Cbilton* in the county of *Buckingham*, Knight, a man of great modeſty, charity, and piety; who, in the year of queen *Elizabeth*, was by her made the firſt high ſheriff for that county, divided from *Bedfordſhire*. He took to wife *Elizabeth*, the daughter of *Alexander Unton*, Eſq. and by her had iſſue five ſons. *viz.* *Sir John Croke*, *Henry Croke*, our author *SIR GEORGE CROKE*, *Paul Ambroſe Croke*, and *William Croke*. *Sir John Croke*, eldeſt ſon of *Sir John*, inherited his father's virtues and fortunes, and was very famous for his wiſdom, eloquence, and knowledge in our laws. Being Speaker of the parliament in the forty-third year of the reign of queen *Elizabeth*, he received his *elogium* at the end thereof from her majeſty; that he had proceeded therein with ſuch wiſdom and diſcretion, that none before him had deſerved better. He was recorder of *London*; and in *Eaſter Term* in the firſt year of the reign of king *James* the firſt was knighted, and made ſerjeant at law; and in *Eaſter Term* in the fifth year of the ſaid king advanced by him to be one of his Juſtices of the then court of king's bench; where he ſo continued until the twenty-third of *January*, in the ſeventeenth year of the ſaid king's reign; at which time he departed this life at his houſe in *Holborn*, leaving behind him a plentiful eſtate and iſſue.

Statute
14. Hen. 8. cap. 5.

Henry Croke the ſecond ſon, and *Paul Ambroſe Croke* the fourth ſon, were grave profeſſors of the common law; and the laſt of them reader of the *Inner-Temple*.

William Croke, the fifth ſon, was a man of an humble ſpirit, and piously diſpoſed, addiſting himſelf wholly to a country life.

SIR

T H E P R E F A C E .

SIR GEORGE CROKE, the third son, and author of this work, was born about the second year of the reign of *Queen Elizabeth*, and passed over his infancy and tender years under the wings and care of a most discreet and loving mother, in the exercise of all good qualities, giving thereby very early signs of his future perfection in learning. When time and diligent instruction had made him fit for a remove, he was sent to *Oxford*, to improve the talent of his natural ingenuity with the help of the arts and study of philosophy. After some abode there, he was again transplanted to the *Inner-Temple*; where he employed the remaining part of his youth in the study of our common law, and was double reader of that house. Upon the twenty-ninth of *June*, in the twenty-first year of the reign of king *James* the first, he received his writ of being serjeant at law, and the same day was knighted, and made the king's serjeant. Upon the eleventh of *February*, in the twenty-second year of the reign of *James* the first, he was created one of the Justices of the common pleas, and continued in that place until *Michaelmes Term*, in the fourth year of the reign of *Charles* the first; at which time, upon the death of that learned and grave Judge *Sir John Doderidge*, he was advanced to be one of the Justices of the then king's bench; from whence I shall take a short survey of him.

See the Epistle
Dedicatory,
ante.

He was of a most prompt invention and apprehension, which was accompanied with a rare memory, by means whereof, and through his sedulous and indefatigable industry, he attained to a profound science and judgment in the laws of the land, and to a singular intelligence of the true reasons thereof, and principally in the forms of good pleading. He was of an universal and admirable experience in all other matters which concerned the commonwealth. He heard patiently, and never spake but to purpose, and was always glad when matters were represented unto him truly and clearly: he had this discerning gift, to separate the truth of the matter from the mixture and affection of the deliverer, without giving the least offence. He was resolute and stedfast for truth; and as he desired no employment for vain glory, so he refused none for fear; and by his wisdom and courage in conscionably performing his charge, and carefully discharging his conscience, and his modesty in sparingly speaking thereof, he was without envy, though not without true glory. To speak of his integrity, and forbearing to take bribes, were a wrong to his virtue. In sum, what *Tacitus* saith of *Julius Agricola's* wife's father, who was a governor in *Britain*, I may truly say of this

Baker's Chro-
nicle, page 504.
2.

THE PREFACE

this *Agricola*, our reverend Judge, my wife's father : "*Agricola tempore curarum remissionumque divisa ; ubi conventus ac judicia poscerent, gravis, intentus, severus, et sapius miscricors ; ubi officio satisfactum, nulla ultra potestatis personâ ; tristitiam et arrogantiam et avaritiam exuerat ; nec illi, quod est rarissimum, aut facilitas auctoritatem, aut severitas amorem, diminuit.*"

Tacitus in *vita*
Agricola.
Tiberius.

‘ That he well and discreetly divided the seasons of his affairs and vacations. In times of audience and judgment he was grave, heedful, austere, and yet merciful too. That duty performed, no face any more or show of authority ; severe and stately looks were laid apart in such sort, that neither his gentle and courteous behaviour weakened the reverence, nor his severity the love due to his person.’

He was of a strict life to himself, yet in conversation full of sweet deportment and affable, tender and compassionate, seeing none in distress whom he was not ready to relieve : nor did I ever behold him do any thing more willingly than when he gave alms. He was every way liberal, and cared for money no further than to illustrate his virtues. He was a man of great modesty, and of a most plain and single heart ; of an ancient freedom an integrity of mind, esteeming it more honest to offend than to flatter or hate. He was remarkable for hospitality ; a great lover and much beloved of his country, wherein he was a blessed peacemaker, and in those times of conflagration was more for the bucket than bellows, often pouring out the waters of his tears to quench those beginning flames which others did ventilate. In religion, he was devout towards God, reverent in the church, attentive at sermons, and constant in family duties. Whilst he lived, he was the example of the life of faith, love, and good works, to so many as were acquainted with his equal and even walkings in the ways of God, through the several turnings and occasions of his life : and though now dead, still continues to do good, being the founder of a chapel, which he caused to be dedicated and set apart for the service and worship of God, and for the ease of the inhabitants of *Studeley* (being an hamlet and member of *Becbley* in *Buckinghamshire*, and at least two or three miles distant from that parish church), as also of an hospital for poor people, both which he endowed with a liberal revenue. At last this pious and learned Judge (finding his age and infirmities to increase, and being desirous, before he put off his decaying and declining body, to have some leisure to examine his life, and to prepare for that great

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— great day wherein all must render an account to the Supreme Judge of their actions) was an humble suitor to the late king for his *writ of ease*, which was denied, and yet in effect granted. And for the rareness, I shall recite both petition and answer, which are as followeth, &c.

TO THE KING'S MOST EXCELLENT MAJESTY,

THE

HUMBLE PETITION

OF

YOUR MAJESTY'S HUMBLE SERVANT,

SIR *GEORGE CROKE*, KNIGHT,

ONE OF THE JUSTICES OF YOUR BENCH,

HUMBLY SHEWETH,

“ THAT he having by the gracious favour of your
“ majesty's late father of famous memory, and of your
“ majesty, served your majesty, and your said late father,
“ as a Judge of your majesty's court of common pleas,
“ and of your highness' court called the king's bench, above
“ this sixteen years, is now become very old, being above
“ the age of eighty years : and by reason of his said age
“ and dulness of hearing, and other infirmities, whereby
“ it hath pleased God to visit him, he findeth himself dis-
“ abled any longer to do that service in your courts, which
“ the place requireth, and he desireth to perform ; yet is
“ desirous to live and die in your majesty's favour :

“ *His most humble suit is, that your majesty will be pleased to*
“ *dispense with his further attendance in any your majesty's*
“ *courts ; that so he may retire himself and expect God's*
“ *good pleasure, and, during that little remainder of his*
“ *life, pray for your majesty's long life and happy reign.*

GEORGE CROKE.”

THE KING'S ANSWER.

“ UPON the humble address, by the humble petition
“ of SIR GEORGE CROKE, *Knt.* who after many years ser-
“ vice done both to our deceased father and our self, as
“ our said father's serjeant at law, and one of his and our
“ Judges

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Judges of our benches at *Westminster*, hath humbly be-
 sought us, by reason of the infirmity of his old age
 (which disableth him to continue to perform to us that
 service he much desireth to have according to his duty
 done), his further attendance might be by us in our grace
 dispensed with; to the end all our loving subjects, who
 have, and shall faithfully serve us (as we declare this our
 servant hath done) may know, that as we shall never ex-
 pect, much less require, or exact from them perform-
 ances beyond what their healths and years shall enable
 them; so we shall not dismiss them without an appro-
 bation of their service, when we shall find they shall
 have deserved it, much less expose them in their old age
 to neglect: As our princely testimony, therefore, that
 the said *Sir George Croke* being dispensed withal, proceeds
 from us at the humble request of the said *Sir George*
Croke (which we have cause and do take well, that he
 is rather willing to acknowledge his infirmity, by his
 great age occasioned, than that by the concealing of the
 same any want of justice should be to our people), and
 not out of any our least displeasure conceived of him;
 do hereby declare our royal pleasure, that we are graci-
 ously pleased, and do hereby dispense with the said *Sir*
George Croke's further attendance in our said bench at
Westminster, and any our circuits. And as a token of
 our approbation of the former good and acceptable ser-
 vice, by the said *Sir George Croke* done to our deceased
 father and our self, do yet continue him one of our
 Judges of our said bench. And hereby declare our fur-
 ther will and pleasure to be, that during his the said
Sir George Croke's life, there shall be continued and paid
 by us unto him the like fee and fees as was to him, or
 is or shall be by us paid to any other our Judges of
 our said bench at *Westminster*, and all fees and duties,
 saving the allowance by us to our Judges of our said
 benches for their circuits only."

Soon after, this good Judge (having been an early
 labourer in the Lord's husbandry, and endured the heat
 of the day till the eleventh hour, whereby he obtained the
 promised penny of this life, which Wisdom hath in store
 for her children, viz. length of days on his right hand,
 and on his left riches and honour) made an holy retreat to
 his house at *Waterstoke* in *Oxfordshire*; where, full of as-
 surance that Christ would be unto him in death advantage,
 he not long after cheerfully resigned up his soul into the
 hands of him that gave it. And upon his tomb, there
 erected

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erected at the charges of his virtuous lady and relict, *Mary*, the daughter of *Sir Thomas Bennet*, Knight, for the lasting memory of his name, whose service deserved the favour of his prince and country, there is this inscription:

GEORGIUS CROKE *Eques Auratus*, unus *Justitiariorum* de
banco regis, *judicio linceato et animo presenti insignis, veritatis*
heres, quem nec minæ nec bonos allexit; regis auctoritatem et
populi libertatem æqua lance libavit; religione cordatus, vita
innocuus, manu expansa, corde humili pauperes irrogavit; mun-
dum et vicit et deseruit anno ætatis sue LXXXII. annoq;
regis Caroli XVII. annoque domini MDCXLI.

Whereunto I shall subjoin,

Horat. lib. 1.
Ode 24.

“ ———— *Cui pudor, et Justitiæ soror*
“ *Incorrupta fides, nullaque veritas:*
“ *Quando ullam invenient parem?* ”

“ ———— *Unto whom, both modesty,*
“ *And justice sister (faith, from scandal clear)*
“ *And naked truth: when will they find a peer?* ”

Concerning the whole work itself, I may, I think, and not immodestly, use the words of the *Roman Prætor* proclaiming the *LUDI SECULARES*, “ *Venite et videte quod nemo mortalium vidit aut visurus est,* ” a work of our Law Reports by one man taken and continued beyond a Jubilee; whereof this part contains the Cases of so late time, that thereby it hath the advantage of former opinions concerning most of the *Quæres* controverted in the elder books, giving a resolution to many of them; and hath also clearly explained several of our late statutes, delivered divers most exact rules for pleading, and carefully set down all legal formalities in the creation of Serjeants at Law, Judges, &c. with other the ceremonies and orders of their precedence, their times of sitting in court, keeping of essoins, adjournment of Terms, and other such ancient rights and usages of our common law; whereby the honour and very being thereof hath been preserved. Of all which I would remind our student of the observation which is given him by *SIR EDWARD COKE*, “ That there is no knowledge, “ case, or point in law, seem it of never so little account, “ but will stand him in stead at one time or other; and “ therefore, in reading, nothing to be pretermitted (a). ”

(a) Co. Lit. 9.2.

The method herein used is likewise considerable; not being stuffed with the pleadings at large, and their many continuances, with the same arguments at bar and bench reinforced *pro et contra*; but here the case is shortly stated according to the points in law therein to be discussed and adjudged,

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adjudged, the reasons plainly and succinctly laid down, and yet the matter intended truly uttered, and, as near as may be, in the name and words of the party who delivered it, and the former authorities to warrant the same summarily vouched; so as the book is (*ad compendium præparatus quantumq; ratio passa est; ita moderatè repressus, ut nec prodiga sit in rã copiã, nec damnosa concinnitas*) already abridged, and, as far as the subject matter will permit, equally balanced; so as neither its affluence shall cloy, or its conciseness be a loss to our students. This book also passeth, in surety of law, most of our former Reports, which were chiefly composed of the sudden speeches of the Justices, upon the motion of Cases by the serjeants and counsellors at the bar. But most of the Cases herein be matters in law tried upon demurrer, or by special verdict, containing matters in law, which both were debated by those of the bar and bench to the uttermost; and in the end allowed, or, for the cause shewn, disallowed; and whereof the author himself had a copy, studied, argued, and after great deliberation gave his judgment or resolution in every of them: and so they be most firm and sure to trust unto.

Julius Solinus
in Epist. Poly-
hist. inscripta.

Plowd. Prologue
to his Commen-
taries.

And whereas it is the advice of SIR EDWARD COKE to students, "that they should look not only to the cases reported, but unto the records of the pleadings and judgments therein, which much confirm the credit of the report, and the reader's surety of the law (a);" in most of the Cases here reported, the number roll, when and where entered, is prefixed; that thereby if any scruple or doubt of error should be in the report, the student might have a ready recourse thereunto. And herein also I shall further secure you, that as already, before the publishing hereof, most of the present Justices have had a perusal of the authentic and original manuscript books of these Reports, composed in their genuine language; so when the rest of them for the public good shall, either in their original or by translation, be made common, I shall with the same care and reverence, like another PISANE LETTER (b), preserve them, as choice monuments of his great prudence

Plowd. Pro-
logue, &c.
(a) Co. Lit.
370.a. 209.217.

(a) The emperors from *Justinian*, who died 565, until *Lotharius* 11. in the year 1125, so much neglected the body of the civil law, that all that time none ever professed it. But when the emperor *Lotharius* 11. took *Amalfi*, he there found an old copy of the *Pandects*, or *Digests*, which as a precious monument he gave to the *Pi-*

fani; by reason whereof it was called *Litera Pisana*; from whence it hath been since translated to *Florence*, &c. and is never brought forth but with torch-light, or other reverence. *Carin. Cron. lib. 4. fol. 438.* *Selden's Annotations upon Fortescue, fol. 20, 21.*

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and unwearied industry that collected them; and will be ready at any time hereafter to produce them for proof or confirmation of what I have or shall publish out of them, when by the honourable Justices, or upon any important occasion, I shall be thereunto required.

I shall not need to apologize for myself in making public these Reports, wherein I had the only propriety, by the free donation of the reverend author: the work I hope will not need it. If I find this acceptable, I shall cheerfully give birth to the other volumes of this eminent person. For as it is my comfort (that God hath vouchsafed), so it shall be my endeavour, that I may any way (though but thus instrumentally) use my hand in the least service tending to a general good; *det Deus ut perficiam.*

FROM MY MANOR-HOUSE of GOR-
HAMBURY, May 7th, 1657.

HARBOTTLE GRIMSTON.

*"Hæc studia adolescentiam alunt, senectutem oblectant,
"secundas res ornant, adversis perfugium præbent,
"delectant domi, non impediunt foris, pernoctant
"nobiscum, peregrinantur, rusticantur."*

CICERO *pro ARCHIA pœta.*

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Hilary Term,

24. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*

Sir Thomas Gawdy, *Knt. (a)*

John Jeoffries, *Esq.*

John Clinch, *Esq.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

} *Justices.*

(a) See Co. 2.
Lit. 3.

Foster and Peacock against Jo. Leonard,
Hilary Term, 23. Eliz. Roll 393.

CASE 1.

AT TACHMENT upon prohibition against the defendant, *Oak and elm* farmer of the parsonage of *Sevenoak* in *Kent*, for suing felled before for tithes of great wood, by the name of *silva cædua*, they are of against the 45. *Edw. 3. c. 3.* The defendant pleaded, that for 300 twenty years heads of the trees, they were of birch, of which by law he ought growth, and to have tithes as *silva cædua*; and as to the rest, which were of birch of any age are tythable. *Post. 55.* *Oak and elm* and elm, they were under the growth of twenty years. Upon *Post. 55.* the first it was demurred in law, and upon the second plea they *Moor, 907.* were at issue. After argument upon the first point by *1. R. Abr. 640.* *CLERK* and *WEEKS* of the one side, and by *2. Inst. 643.* *FULLER* and *TANFIELD* of the other, it was adjudged for the defendant, that he *Plowd. 470.* should have tithes of birch; for birch is not such wood as the statute *1. Brownl. 94.* intends by the name of *gross bois*, for it is intended of such wood *Hob. 219.* as serveth for building, and other uses of a high nature, and not *Cro. Jac. 199.* only for fuel, as the nature of birch is. And of oak and elm cut *Bunb. 98.* down before the age of twenty years, tithes shall be paid; for until *12. Mod. 524.* that age they are not of such value as the law regardeth for the *3. Burr. 1310.* purposes aforesaid. Therefore, as to the birch, it was awarded *Post. 55.* that he should have a consultation; he having entered a *non vult ulterius* *Post. 55.* *sequi* for the residue.

The Bishop of Norwich against Pricket.

CASE 2.

ACTION *de scandalis magnatum* was brought by the plaintiff for *Scand. mag. lies* these false and scandalous words, *viz. "You" (prædictum* for charging a *scopum innuendo)* "have writ a letter to me, which I have to Bishop with he- shew, which is against the word of God, against the queen's terodoxy in reli- authority, and to the maintainance of superstition, and that I gion. *Post. 67.* will stand to prove against you." They were at issue; and at *1. Leon. 336.* the trial at *nisi prius*, the defendant confessed he spoke the words, *2. Mod. 160.* whereupon a writ was awarded to enquire of damages, which were *4. B. Abr. 406.* found to 500 marks. At the *day in bank*, the Court was not *Post. 67.* wised to give judgment, and the parties were adjourned. After- *Post. 67.* wards, upon good deliberation, it was awarded that the bishop *Post. 67.* should recover the 500 marks, and eight pounds for costs. *Post. 67.*

VOL. I.

B

Afterwards

Norwich
against
PRICKET.

Afterwards the bishop released part of the costs.—NOTA, This case was taken out of the record which was entered *Hilary*, 24. *Eliz. rot.* 39.

CASE 3.

Boxe's Case.

Words action-
able.

S. C. Winch. 40.
Post. 214. 878.
Ld. Raym. 720.
Strange, 142.
1. C. Dig. 184.
2. Term Rep.
475.

ACTION for these words, "Thou art burnt and hast the "Pox!" After verdict, it was alledged that the action doth not lie, for it is not said he had the FRENCH POX, but it may be intended the *Small-Pox*; and for saying he had the POX generally, no action lieth. But WRAY said the action lieth; for when it is said, "Thou art burnt and hast the *Pox*," it shall be intended the FRENCH POX, which usually cometh of *burning*; and it was adjudged for the plaintiff.

Vide 21. Jac. 1. c. 16.

CASE 4.

Foster against Pitfall.

Lands devised
by a husband to
a wife in tail ge-
neral, with re-
mainder to a
stranger, are not
within 11. Hen.
7. c. 20.
Post. 24. 514.
524.

S. C. 1. Leon.
261.
Co. Lit. 366.
4. Co. 4.
2. Vern. 429.
Plowd. 30.
Palm. 217.
Cro. Jac. 173.
Com. Rep.
369.
2. Bac. Abr. 92.
in notis.
Cruise on
Recov. 153.
(a) Plow. 459.
(b) Confirmed
by 31. Hen. 8.
c. 36.

EJECTIONE FIRMÆ. The case was, one *Brook* devised land to his wife in tail, the remainder over to another, and dieth. The wife with her second husband aliens this land by fine and dieth. The question was, If the son of the *feme* may enter upon this alienation, by the 11. Hen. 7. c. 20.? And all the Justices held that it is directly within the words of the statute, for that goeth to all estates in tail, or for life, of the lands of the husband, or given by the ancestor of the husband. But WRAY, C. J. CLENCH, and GAWDY held, that this case is not within the intent of the statute, for the statute is only intended of lands given by the husband, or his ancestor, for the advancement of the wife; and although this case is within the words, yet it not being within the intent of the statute, the statute does not extend to it; and vouched *Easton v. Studdes* (a). The remainder of this land is limited to a stranger, and so shall not be intended to be for a jointure, where no inheritance is reserved to the baron or his heirs: and the meaning of the statute is, that she shall not prejudice the heirs of the baron, that the land shall not descend to them; but here, upon her alienation nothing reverteth or descendeth to the heirs of the husband, and so is clearly out of the statute.—NOTA, It was adjudged, 21. *Eliz.* that if the baron be seised of land in right of his wife, and they levy a fine, and the conusee grants a rent to them in tail, the baron having issue, dieth, the *feme* alieneth the rent, this is out of 11. Hen. 7. c. 20. (b) for the rent cometh in lieu of the land.

CASE 5.

Lord Norrice against The Marquis of Winchester.

A tenant in tail,
remainder to B.
A. seffers an er-
roneous recove-
ry. The com-
mon vouches
releases. If A.
die without is-
sue, B. may re-
verse it by writ
of error.

ERROR to reverse a common recovery had by the ancestor of the Lord Marquis against *Lionell Norrice*, who was tenant in tail, the remainder to the plaintiff. The defendant pleads a release of all errors by *Thomas Chapipan* the last vouchee, and the common vouchee, and demands judgment, &c. *Plowden*, for the defendant, argued, that all the burden lieth upon the last vouchee, for he is to make recompence to all, and therefore he is to bring error, and so he may release errors, and bar all others; and so it is adjudged 17. *Edw.* 2. "Error" 90. But all the Justices

Raym. 93. Skin. 247. Comb. 8. Salk. 260. 2. Bac. Abr. 553. Cowp. 702. 1. Term Rep. 738.

resolved

resolved the contrary, for the common vouchee is put in only for form, and in truth he renders nothing; and therefore it is against reason that his release should bar others that have the loss, and are entitled to have remedy by the reversal of the judgment. **NORRICE against WINCHESTER.** 1. P. Will. 536. 2. P. Will. 119. 3. P. Will. 206.

-GAWDY. If execution be sued against the common vouchee, so that he renders in value, then upon such an averment, the loss falling upon him, his release shall bar the others (*quod WRAY conceffit*); but here he renders nothing, and therefore shall release nothing. They all agreed that the case of 17. Edw. 2. was not law; and it was adjudged that the release was no bar.

Green's Case.

CASE 6.

OBJECTIONE FIRMÆ. The case was, a prebend let land to Green for years, rendering rent, and a re-entry for non-payment. The rent was demanded and was not paid, and two days after the lessor received the rent of him, and maketh him an acquittance by the name of his fermor: and if this receipt doth bar him of his re-entry, was the question. And it was clearly resolved that the bare receipt of the rent after the day was no bar, for it was a duty due to him; but a distress for the rent, or a receipt of the rent due at another day, was a bar, for those acts do affirm the lessee to have lawful possession: so if he maketh him an acquittance, with a recital that he is his tenant; and in this case by calling him his fermor, it is a full declaration of his meaning to continue him his tenant; and it was adjudged that the entry was not lawful. **If a lessor receive rent-arrear by any act affirming the lessee's possession, it bars his right of re-entry for non-payment on the day it was due.** Post. 220. 1. Leon. 262. 3. Co. 64. b. Co. Lit. 211. b. 215. a. Cowp. 243. 482. 803.

Doug. 57. 1. Term Rep. 161. 2. Term Rep. 425.

Tanfield's Case.

CASE 7.

It was agreed by all the Justices in the common pleas, that the grantee of an annuity for years cannot have an action of debt for the arrearages during the term in the annuity. **Debt by grantee of annuity. Vide post. 268. 895. Yelv. 208.**

Swann's Case.

CASE 8.

It was said to be adjudged, that in covenants perpetual, if they be once broken, and an action of covenant brought, and a recovery upon it, if they be afterwards broken, a *scire facias* shall be had on the judgment, and need not bring a new writ of covenant. **Scire facias.** 1. Wood, 395. 2. Bl. Rep. 844. 1. Term R. 388.

Valentine Hyde against Hill.

CASE 9.

OBJECTIONE FIRMÆ. It was held upon evidence, that if baron and feme English go beyond sea without licence, or tarry there the time limited by the licence, and have issue, that the issue be an alien (a), and not inheritable, contrary to the opinion of **Issue born abroad are aliens.** Cro. Car. 602. 7. Co. 18. Vaugh. 279. 1. C. Dig. 297.

By 29 Car. 2. c. 6. children born of English parents out of the King's dominions are declared to be natural-born subjects, and by 7. Anne, c. 5. the children of natural-born subjects, born out of the King's allegiance, shall be deemed natural-born subjects; but by 4. Geo. 2. c. 21. this is extended to such children whose fathers at the time of their birth are natural-born subjects of Great Britain, and not liable to the

penalties of treason or felony in England or Ireland, or in the service of an alien enemy. And the privileges of 7. Ann. c. 5. thus explained by 4. Geo. 2. c. 21. are extended by 13. Geo. 3. c. 21. to all children born out of the King's allegiance, whose fathers are entitled to the rights of natural-born subjects. See also 12. and 13. Will. 3. c. 2. s. 3. and 25. Geo. 2. c. 39.

Easter Term,

24. Eliz. In the Queen's Bench.

Sir Christopher Wray, Knt. Chief Justice.

Sir Thomas Gawdy, Knt.

John Jeoffries, Esq.

John Clinch, Esq.

} *Justices.*

Sir John Popham, Knt. Attorney General.

Sir Thomas Egerton, Knt. Solicitor General.

CASE 1.

Ecclestage against Maliard.

An award cannot order any act to be performed by a stranger.
Post. 70. 432.

- 10. Co. 131. b.
- 2. Saund. 337.
- 1. Lev. 6. 235.
- 1. Salk. 74.

DEBT, upon an obligation to stand to the award of *J. S.* who awarded that one of the parties should pay to the son of the other party 5l. which was bequeathed to him; and for not payment, action was brought; and it was adjudged that the action did not lie, for he was not bound to pay or tender the money, being a stranger to the award. In *Mich. Term*, 18. and 19. *Eliz.* it was adjudged between *Henry Norwich* and *Simon Norwich*, that, where they were mutually bound to stand to the award of *Sir Edward Montague*, of all demands, &c. who awarded that *Simon Norwich*, with three sureties, should be obliged to *Henry Norwich* for the payment of a certain sum, it was a void award; for the arbitrator had no authority to award any thing concerning a third person: but in that case it was said, if the award had been to pay 10l. to *J. S.* or that the party shall be non-suited, or discontinue an action, it had been a good award, for they are acts to be done by the party himself; and if he tendereth the 10l. to *J. S.* and he refuseth, or offers to be nonsuit, or discontinue the action, and the court refuseth, the obligation is saved, but he ought to plead tender of payment, and offer to be nonsuited, &c. *Vide* 22. *Hen. 6.* 46. 17. *Edw. 4.* 5. 18. *Edw. 4.* 22. and 19. *Edw. 4.* 1.

CASE 2.

Margaret Marshall's Case.

A general pardon may be assigned as error to reverse an outlawry, if the party had not an opportunity of pleading it.
Post. 25.

- (a) *Quere.*
- Vide* 3. *Inst.* 131.
- 6. Co. 11.
- 2. R. Abr. 306.
- Hob. 283.
- 1. Sid. 55.
- 1. Hawk. 573.
- Strange, 197.

ERROR, to reverse an outlawry in petty treason; and alledged, that whereas the offence was committed in the reign of queen *Mary*, that 1. *Eliz.* a general pardon was made of all treasons and felonies, that notwithstanding 3. *Eliz.* she was waived for this treason.—THE COURT said that the pardon was not general, and that they were not to take notice of it, if the party doth not take advantage of it; but it was held that she may have a writ of error upon this matter (a), because she had no day in court before to plead this matter, but always made default: as if one hath a release to plead, and upon a *scire facias* he is returned *nihil*, so as he never had day to plead it, if judgment be given upon his default, he shall have an *audita querela*; but if he had been returned, “warned,” and appeared, and did not plead it, and judgment is given, he hath no remedy upon the release.

The

The Lord Montague *against* Sheppard.

CASE 3.

TRESPASS. It was held by the Court, that a tenant by copy of court roll cannot by the common law take trees for house-boot, hedge-boot, and cart-boot, &c. as tenant for life or years may do which have an estate certain; but a copyholder hath not this liberty, except by special custom, and such customs are in many manors, and are good.

Gibb. Ten. 236. 1. B. Abr. 485. Ld. Ray. 551. 3. Term Rep. 391. 746.

Vast against Gawdy.

CASE 4.

DEBT upon an escape against the defendant, guardian of the Marshalsea, for suffering *T. B.* who was in execution at the plaintiff's suit, to escape. The defendant pleads that he did not suffer him to escape; and gave in evidence that the said *T. B.* brought an attain (a) to reverse the judgment; and upon his prayer the Court did bail him, that he might prosecute his attain *cum effectu*: but this bail was not entered upon record.—It was held by *Wray, C. J.* and the other Justices, that the evidence was good, and that the Justices by their authority may discharge the party of the execution, and do it upon good consideration; and the Justices use to command the marshal to bring the prisoner before them to their chambers, and it is a good discharge for him: for the marshal of himself cannot suffer the prisoner to go out of his house by *baston* or otherwise; but by the command of the Justices he may remove him, although it be to another county, and it is no escape. The escape supposed here is for letting him to go by bail, which is the act of the Court and not of the marshal, and may well be given in evidence. *Wray* said, that upon execution sued after verdict, although the party sues an attain, the Court usually doth not bail him; for the verdict is intended true till reversed; but sometimes the Justices upon good consideration will bail him: and here although the bail be not entered, yet the plaintiff for his benefit may cause it to be entered, and then he may have a *scire facias* upon the bail, and so is not at any mischief. And afterwards the plaintiff was nonsuited.

To enable a defendant in execution to prosecute an attain, the king's bench hath a discretionary power to admit him to bail; and it will exonerate the gaoler from escape, the not entered on record.
Dyer, 193.
Cro. Car. 14.
3. Co. 44. a.
Cowp. 63.
(a) The writ of attain is now rendered obsolete, by the practice of granting new trials on motion.
3. Bl. Com. 403.
3. Burr. 193.
Post. 309. in notes.

The Countess of Suffex *against* Wroth.

CASE 5.

THE case was, land was assured by the *Earl of Suffex*, by act of parliament, to his wife for her jointure, the reversion in fee to the earl, of the manor of *Burnham*, with a *PROVISO* for the earl to make leases for one and twenty years, rendering the ancient rent. The earl makes a lease for one and twenty years, rendering, &c. and before the end of it makes another lease by indenture to the lessee for one and twenty years, bearing date 30th March, to commence at Michaelmas following. It was adjudged a void lease, because for the time it is a lease in reversion; and if he might make a lease to commence at the Michaelmas following, he might make it to commence twenty years after. The statute intended not to give him that liberty; and it being a liberty and power, it must be strictly pursued. The land was assured to the countess for her jointure, which is favoured in law; and if the earl might make leases one after the other, she should never have benefit of her jointure; which the statute did not intend.

Construction of powers.
Palm. 468.
6. Co. 33.
8. Co. 69.
1. Leon. 33.
3. Leon. 130.
4. Leon. 61. 64.
Poph. 9.
Yelv. 222.
Cro. Jac. 318.
3. Bac. Ab. 416.
1. Ld. Ray. 269.
P. on P. 411.
Cowp. 260.
266. 714.
Doug. 53. 293.
565.
1. T. Rep. 705.
2. T. Rep. 241.
380. 781.

Trinity Term,

24. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*Sir Thomas Gawdy, *Knt.*John Jeoffries, *Esq.*John Clinch, *Esq.*} *Justices.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Edwards' Case.

It is slander to charge a man with an intent to do an unlawful act.—*Post. 191.*
250. 308. 349.
569. 618. 888.
Yelv. 58.
2. R. Ab. 454.
1. Strange, 194.

ACTION for these words, “*Jo. Edwards did wrap gun- powder in a piece of tow, and laid it under my window, and put fire to it, minding to burn my house.*”—*WRAY, C. J.* held that the words are actionable; for by such speech the plaintiff's good name is impaired: so to say, “*he lay in wait in the highway intending to murder me.*” And the plaintiff had judgment.

CASE 2.

Dorrell against Collins,

An exception in a lease, which goes to the whole thing demised, is void, *Post. 244.*
Hob. 170.
1. Wood, 242.
Sh. Touch. 75.

EJECTIONE FIRMÆ. Upon not guilty, the jury found that the master and scholars of the college of *Sinkford* were seised in the time of *Hen. 8.* of the manor of *Hodley*, of which the place, &c. is parcel, and let all their lands in *Lambcurs* (except the manor of *Hodley*, in *Kent* and *Suffex*) to *J. S.* for years: and they further find, that the master and scholars had no other lands in *Lambcurs* than the said manor.—The question was, if the manor passeth by the lease? And all the Court held, that it being found they had no other land than the manor, the exception is void, because it goeth to the whole thing demised; otherwise of an exception of part.

In conveying an interest under an administration granted by an Archbishop, it need not be shewn how administration was granted. *Post. 102. 431. 456.*
338. 879.
Cro. Jac. 556.
3. Lev. 273.

BUT an exception was taken to the declaration, because the plaintiff conveyed his interest by an administrator, to whom the Archbishop of *Canterbury* did grant administration of all the goods of the lessee in *Kent* and *Suffex*; but doth not shew how the archbishop granted it; either as ordinary or by his prerogative: and this was held by all the Court, a material exception. But it was afterwards alledged, that all the precedents, in this court and in the common pleas, were so in general, without special shewing how; and for that they would not change the precedents, they disallowed the exception.

2. B. Ab. 442. 1. Salk. 38. 41. Dougl. 4.

A term held in autre droit will not pass by a grant of “all my goods and chattels,” *Post. 164.*

AND in this case it was held, that if an administrator doth grant omnia bona et catalla sua, a term which he hath as administrator doth not pass, for it is not suum, but he hath it in right of the

intestate:

intestate : but if one hath a lease as executor or administrator of the manor of *D.* and he granteth all his right and interest in the manor, the term which he hath as executor doth pass ; for he had no other right in it, and his intent is to pass it : but by general words it shall not pass (a).

DORRILL
against
COLLINS.

(a) 2. L. Ray. 1306. Cro. Jac. 318. 1. Bro. Caf. Ch. 127.

Teat's Case.

CASE 3.

DEBT upon an obligation. The condition of the obligation was, that if the obligor deliver to the plaintiff an obligation, in which he was obliged to the defendant, before such a day, that then, &c. The defendant sueth the plaintiff upon that obligation, and recovereth ; and afterwards, before the day, he delivereth the obligation to him.—The question was, If this was a performance of the condition ?

A condition to deliver an obligation is not performed by the delivery of it after it has been put in suit, and judgment recovered on it. Post. 384. Moor, 709. Goldf. 177. 1. Leon. 32. Sid. 48. Ray. 25. 3. Ba. Ab. 707. 1. Wood, 299. Bul. N. P. 161.

WRAY, C. J. and the other Justices held it was not : although the words were performed, yet the intent was not performed ; for the intent was, he should have the obligation for his discharge ; which is not by the delivery of it at the day, for it is transferred *in rem judicatam* : and notwithstanding the delivery of the bond, yet he may have benefit of the judgment.

Shelton's Case.

CASE 4.

THE case was, lessee for years grants his term by deed, and sealeth it in the presence of divers, and of the grantee himself ; and the deed at the same time was read, but not delivered ; nor did the grantee take it, but it was left behind them in the same place.

Grant good without actual delivery. Post. 122. 336. Owen, 44. 95. Co. Lit. 36. 7. Co. 137. 1. Wood, 232.

The opinion of all the Justices was, that it was a good grant ; for the parties came for that purpose, and performed all that was requisite for the perfecting it, except an actual delivery : but it being left behind them, and not countermanded, it shall be said a *delivery in law*.

Trinity Term,

24. Eliz. In the Common Pleas.

Sir Edmund Anderfon, *Knt. Chief Justice.*

Sir William Periam, *Knt.*

Thomas Meade, *Esq.*

Hugh Wyndham, *Esq.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

} *Justices.*

CASE 1.

Anonymous.

What shall be a
suspension, and
what an ex-
tinguishment of a
copyhold.

Post. 21.

Moor, 185.

Cro. Jac. 84.

4. Co. 31. b.

See 1. Bac. Ab.

481, and the

cases there cited, and 2. Bac. Ab. 451. Gilb. Ten. 305. 2. Term Rep. 705.

A COPYHOLDER in fee marrieth a woman feigniorefs of the manor, and they suffer a common recovery, to the use of themselves for life, remainder over.

It was held by ANDERSON, C. J. MEADE, and PERIAM, that the copyhold was extinct; for by the recovery the baron had gained an estate of freehold; but they all held that by the intermarriage it was only suspended.—MEADE said it was adjudged in *Newport's Case*, that if a copyholder takes a lease of the manor, his copyhold is extinct.

CASE 2.

Tunbridge's Case.

A distress for
damage feasant
may be severed;
but not for rent
service.

Post. 549.

4. H. 6. pl. 7.

Co. Lit. 47. a.

2. Keb. 596.

3. Sid. 440.

422.

2. Roll. Ab.

664.

1. Vent. 36.

3. Burr. 579.

TRESPASS for taking his horses. The defendant justifieth for *damage feasant*. The plaintiff replieth, that before the trespass supposed, &c. he yoked the horses, and tied them to the plough, and the defendant untied them, and took them, &c.

The opinion of the Court was clearly, that he may well sever them for *damage feasant*: for although they are an entire distress when annexed to the plough, and, as ANDERSON said, if the plough or cart by chance fall upon a man, and kill him, as well the horses as the cart, &c. are forfeited; yet in this case they may be severed.

MAYWOOD said, there is a difference in the books: when the distress is for rent-service, there they cannot be severed; for they are an entire distress, and he claimeth no interest in the land, but only a rent or service, with which the land is charged (a). But in a distress for *damage feasant*, the party doth claim the land itself, and he may have several actions for trespass for every horse; for every one of them doth trespass. And the plaintiff had day to amend his replication.

(a) See 2. Will. and Mar. c. 3. 8. Ann. c. 14. 4. Geo. 2. c. 28. and 11. Geo. 2. c. 19. Co. Lit. 47. b. 3. Bl. Com. 6. 145.

Michaelmas

Michaelmas Term,

24. and 25. Eliz. In the Common Pleas.

Sir Edmund Anderfon, *Knt.* (a) *Chief Justice*, (a) *Moor*, 216.

Sir William Periam, *Knt.*

Thomas Meade, *Esq.*

Hugh Wyndham, *Esq.*

Sir John Popham, *Knt.* *Attorney General.*

Sir Thomas Egerton, *Knt.* *Solicitor General.*

} *Justices.*

Bennet's Case.

CASE 1.

COVENANT. The case was, *A.* did covenant with *B.* to make such assurance as his counsel should advise. The questions were two: *First*, If *B.* must give notice? *Secondly*, What notice was sufficient?

THE COURT held clearly that *B.* must give notice of the assurance, for otherwise *A.* doth not know his counsel or their advice; and *B.* is not only to shew him the assurance that he is to make, but is to permit him to read it, and to go to his own counsel to consider it; and *A.* is to have convenient time after the assurance shewn him, to perfect it.—ANDERSON, C. J. said, that if *B.* himself doth devise the assurance, and make it, *A.* is not bound to perform it; for he is only to make the assurance that the counsel of *B.* shall advise, and not that which *B.* himself shall devise; and it is a good plea, that *councilum non dedit advisamentum*. 6. Hen. 7. pl.

In what manner a conditional covenant shall be performed.
Post. 97. 298.
404.
5. Co. 19, 20.
2. Co. 3. b.
Moor, 143. 183.
Doug. 685.
1. Term Rep. 638
159.
Onslow's N. P.

Anonymous.

CASE 2.

ANDERSON, C. J. said, that if one devise land to *J. S.* in fee, and after by the same will devise that land to *J. D.* for life, both parts of the will shall stand; and in construction of law, the devise to *J. D.* shall be first. So if a devise be to *J. S.* in fee, and afterwards, in the same will, the land be devised to *J. D.* in fee, they are joint-tenants.

MEADE said, that case had been often moved, and always ruled, that the devise is good to them both, and they shall take as tenants in common, or at least as joint-tenants. And ANDERSON said, and it was agreed by the whole Court, that if a termor deviseth to *J. S.* so much of his term as shall be arrear at the time of his death, this is a good devise for so much of the term as remaineth at his death; and the case in *Brooke* is good law.

A devise of the same land to *A.* for life, and by the same will to *B.* for life, or to *A.* in fee, and then to *B.* in fee, creates a joint-tenancy.
Post. 217. 330.
431.
Co. Lit. 212b.
8. Co. 95.
Yelv. 210.
Plow. 541.
Cro. Jac. 49.
3. Leon. 11.
Str. 117.

Clay's

CASE 3.

Clay's Case.

Writs, viz. of partition, which command a sheriff to do an act in his own person, cannot be executed by deputy; and the fact may be inquired into before the return is filed.

1. Jones, 389.
Booth, 245.
Lit. f. 248.
Co. Lit. 167.
11. Hen. 4. 7.
6. Co. 12.
Heb. 13.
Jenk. 181.
8. Co. 52.
4. Co. 65.
Dyer, 204.
2. Inst. 390.

A WRIT OF PARTITION being awarded, the Court was informed that at the time of the partition made, the sheriff was not upon the land in person, as he is to be; and it was prayed that the writ should not be received, but a new writ awarded.

The opinion of MEADE, WYNDHAM, and PERIAM was clear, (ANDERSON, C. J. being absent), that they may well examine this matter before the return and filing of the writ; and thereupon they examined the under-sheriff, and he confessed that he was there, but not the sheriff himself; and thereupon the writ was staid, and a new writ awarded. And they held the same law was in all cases where the words of the writ are, "that the sheriff shall go in his own person," as in an *accedas ad curiam*, *waste*, *redisseisin*, if exception be taken at bar before the return of them be received: but if the sheriff in such writ returneth, that he was there in proper person, and this return be received, and the writ filed; then the Court cannot examine it, for the return is good, and the party can have no averment against the return, nor can have error. And MEADE said, he had seen it so ruled as here.

Dalt. 34. F. N. Br. 188. c. Sed vide 2. P. Wms. 92.

CASE 4.

Anonymous.

A grant to A. for life with remainder to his children is good, tho' neither the children nor the word remainder be named in the deed.
Post. 121. 334.
742.

Plowd. 159.
Dyer, 125.
Co. Lit. 7.

SNAGG, *serjeant*, moved this case. An abbot and convent, by deed indented under their common seal, granted to baron and feme, being tenants for years in possession, that they shall have the lands for their lives; and granted further by the same deed, that after their deaths their children should have the land for forty years.

The question was, If the children take any benefit of this grant, not being parties to the deed? And by the opinion of MEADE, WYNDHAM, and PERIAM, clearly, they shall take by way of remainder, although there be no word of remainder in the deed; and as a remainder they may take, though they be not parties to the deed.

1. Roll. Rep. 319. 1. Wood's Con. 213.

CASE 5.

Anonymous.

An action on the case lies for setting fire to a house by mischance, and not an action on the custom.

3. Lev. 359.
1. Salk. 19.
Corth. 202.
Douglt. 668.

SNAGG moved this case, and demanded the opinion of the Judges in it. J. S. with a gun at the door of his house shoots at a fowl; and by this fireth his own house, and the house of his neighbour; upon which he brings an action on the case generally, and doth not declare upon the custom of the realm, as 2. Hen. 4. *vide* for negligently keeping his fire.

The question was, If this action doth lie? And all the Court held it did; for the injury is the same, although this mischance was not by a common negligence, but by misadventure: and if he had counted upon the custom of the realm, as 2. Hen. 4. the action had not been well brought; yet *consuetudo regni est communis lex* (a).
Kinguel

(a) Vide
6. Ann. c. 31.

Kinguel against Jo. Knapman.

CASE 6.

DEBT upon a bond. The condition was, that "whereas there were divers controversies between the plaintiff and *Jo. Knapman*, and a stranger, the plaintiff and the said *Jo. Knapman* submitted themselves to the award of *John Coxfin*; and the defendant bound himself in two hundred pounds to the plaintiff, that *Jo. Knapman* should perform the award on his part," &c. The arbitrator awarded, that the said *Jo. Knapman* should pay to the plaintiff thirty pounds, viz. twenty pounds at Easter, and ten pounds at Michaelmas next. The defendant pleads payment of the twenty pounds at Easter; and as to the ten pounds, that the said *Jo. Knapman* died before Michaelmas: upon this it was demurred.

The question was, If by the death of *Jo. Knapman* the obligation was discharged? And it was argued by **BEAUMONT** that it was not, for the ten pounds was a duty to the plaintiff which was to be paid, and the executor may perform it; and the executor is to pay it, although not named, as he shall take advantage of a thing done unto or by the testator. *Bar.* 216. 45. *Edw.* 7. *Dalton's Case in the Commentaries.* 10. *Hen.* 7. pl. 18. But if it be a thing which is not in their power, it is otherwise; as to make a feoffment. 14. *Edw.* 3. pl. 4.—**HEAL** contra. For the performance of the award was a thing collateral, as 19. *Hen.* 8. pl. 17. 17. *Edw.* 4. And here the defendant that is obliged is a stranger; and it is not material, though it be in the power of the executor to perform it. 38. *Hen.* 6. pl. 2. 27. *Hen.* 8. pl. 16.

But all the Justices held the obligation was forfeited; but they would not give judgment, because the penalty was great for such a small duty (a).

An executor is bound to perform an executory order in an award against his testator, although the time of performance does not happen till after his death.

Post. 277.

Cro. Jac. 300.
2. *Leon.* 155.
1. *Wood's Con.* 313.

Browne against Daukes.

CASE 7.

ACTION FOR WORDS. "Thou art a pillory knave: re-member, *Browne*, thou shouldst have been set on the pillory." And the plaintiff had judgment, though it was not said he was set upon the pillory (b).

(a) For the kind of actions which survive against an executor, see *Cowp.* 375.

(b) *Sed vide post.* 31. contra.

Hilary

Hilary Term,

25. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*Sir William Periam, *Knt.*Thomas Meade, *Eſq.*Hugh Wyndham, *Eſq.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*} *Juſtices.*

CASE 1.

Foljamb's Caſe.

An aſſiſe abated for the not coming of the juſtices on the adjournment day. 4. Hen. 7. pl. 8. Theol. bk. 12. c. 8. Dyer, 226. Co. Lit. 135. 2. Hawk. 426. Dougl. 45. 2. Ter. Rep. 731.

AN ASSISE being arraigned before JUSTICE MEADE in his circuit, and being adjourned to the ſecond Saturday in Michaelmas Term to Serjeant's-Inn in Fleet-ſtreet; and day being then given to answer, that term was kept at Hertford, and a day was given to the party to answer the ſecond Saturday in Hilary Term. Being now moved, it was held clearly, that the aſſiſe was diſcontinued by the not coming of the Juſtices the firſt day, and the party is put to a re-ſummons againſt the jurors, and a new attachment againſt the defendant, and to begin of new to arraign his aſſiſe. 25. Aff. 5. Keilw. 2. Brooke "Diſ. de Pro." 29.

CASE 2.

Fitz's Caſe.

A ſheriff is not diſcharged from his office until the new patent is ſhewn to him. Poſt. 366. 440. Moor, 186. Dougl. 463. (4) Ste 3. Geo. 1. c. 15. and 20. Geo. 2. c. 37. f. 2.

DEBT againſt him as ſheriff of Devon. FRANCIS GAWDY, ſerjeant, ſhewed the truth of the caſe to be, that upon a recovery in debt againſt A. a *capias ad ſatisfaciendum* was awarded to Sir John Clifton, then ſheriff. A new patent was made to Mr. Kircombe; and afterwards, and before notice, Sir Jo. Clifton arreſted A. and left him in execution. Kircombe dieth (a), and Mr. Fitz was made ſheriff, and let A. go at large. The queſtion was, If it were a good arreſt by Sir Jo. Clifton? for if it were not, it was no eſcape.—THE COURT held clearly, that the arreſt was good, and it was an eſcape;—for Sir Jo. Clifton remained ſheriff, and is not diſcharged of his office until the new patent is ſhewn to him, ſo as he may have notice of his diſcharge: and if in the mean time, between the ſealing of the new patent and the ſhewing of it to him, he keeps a county court, it is good.

CASE 3.

Sir Lewis Mordant's Caſe.

Succession to a peerage *tempore parliamenti*, does not determine the office of ſheriff. Poſt. 366. 2. C. Dig. 582. 4. B. Ab. 435. Dougl. 45. 2. Term Rep. 731.

MEMORANDUM, He was ſheriff of the counties of Bucks and Bedford. Lord Mordant his father died 20th April, *tempore parliamenti*. It was held by all the Juſtices, and the attorney and ſolicitor of the queen, that his office by this matter is not determined, although he be now a baron of parliament, and that he yet remaineth ſheriff *ad voluntatem reginæ*. Dyer's Manuscript, 13. Eliz.

CASE 4.

Guy againſt Rand.

Ejectment. Poſt. 884. Yelv. 166. 1. Brownl. 145. 3. Sid. 239. Owen 133. 3. Lev. 334. 1. Burr. 330. 5. C. Dig. 167. 3. Term Rep. 16.

EJECTIONE FIRMÆ. The plaintiff declared of an ejectment of one hundred acres of land, and ſhewed his leaſe in evidence only of forty acres; and it was ſaid he had failed of his

lease, for there was no such lease as that of which he did count. But it was ruled to be good for so much as was comprised in his lease; and for the residue, the jury may find the defendant not guilty.

GUY
against
RAND.

Wrenche's Case.

CASE 5.

DEBT upon an obligation. The condition was, to stand to the arbitrement of J. S. of all causes then depending, so as the award be made before, &c. in writing. The defendant pleads no arbitrement. The plaintiff shewed that J. S. did award, &c. that the plaintiff should release to the defendant an action of account then depending, and for that the defendant should pay to the plaintiff ten pounds, and this was delivered in writing, &c. and the defendant had not paid, &c. Issue was taken upon the arbitrement, and found for the plaintiff.—**Plowden** moved in arrest of judgment, that the submission was of all actions then depending between them, and the award was, that the plaintiff should release an account then depending; which is to be intended at the making of the award, and not at the time of the submission, and so plainly out of the submission, and so no good arbitrement.—The Court commanded judgment should be staid, till the other party answer it.

Variance between the submission and the award.
Post. 861.

Cowp. 178.
766.
1. Term Rep. 240.

Anonymous.

CASE 6.

FLOWERDEW, *serjeant*, moved this case. A process issued against J. S. to arrest him; he keeps his house to save himself from arrest, and afterwards goeth out to the market and to other places; and when he heareth again of a new process out against him, he keeps his house, and afterwards goeth at large. The question was, If he were within the statutes of bankrupts (a)? And all the Court held he was not (b), because he use to go at large; and it might be, that his policy would not prevent the serving of the process; for he might be met withall unwittingly.

Keeping house is no act of bankruptcy, if the party go afterwards at large.
(a) See 13. Eliz. c. 7.
7. Jac. 1. c. 15.
5. Geo. 2. c. 30.
(b) Sed vide 1. Term Rep. 59. contra.

Salk. 170. Strange, 809. Bull. N. P. 39. 1. Atk. 201. Cook's B. L. 72. 2. Term Rep. 59. contra.

Lawrence against Netherfale.

CASE 7.

TRESPASS. The sheriff returned in common pleas, that the defendant was attached *per catalla ad valentiam* ten pounds, and it was adjudged a void return; for he ought to return that he was attached by one beast or chattel certain, and name them, so that they may be forfeited; for upon such general return, none of them can be forfeited.

The sheriff's return must specify the things attached.

Carth. 225.
Lutw. 1457.

2. Salk. 589. 2. Term Rep. 155.

Anonymous.

CASE 8.

IF one taketh *trop petit distress* for rent, and after taketh another distress for the same rent, this is not good; for he cannot avow two distresses for the same rent, for it was his folly that he took not a better distress at the first. But in the *Abridgement of the Assises* it is said, that if there be not sufficient distress when he distressed, he may distrain again (a).

A man cannot take two distresses for the same rent if there be sufficient at first.

1. Mod. 71. 283.

L. Ray. 205. 1. Vent. 104. Fitzg. 85. Moor, 7. Bro. Dif. 98. 3. Com. Dig. 115. 2. Bac. Abr. 115. 3. Bl. Com. 12. 1. Bur. 580. 590.

(a) By 17. Car. 2. c. 7. where cattle are distrained, and there are not sufficient to satisfy the arrears, the party, &c. may distrain from time to time.—See also 1. and 2. Phil. and Mary, c. 12. and 2. Will. and Mary, sess. 2. c. 5. and Onslow's N. P. 54.

Easter Term,

25. Eliz. In the Common Pleas.

Sir Edmund Anderson, *Knt. Chief Justice.*Sir William Periam, *Knt.*Thomas Meade, *Esq.*Hugh Wyndham, *Esq.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*} *Justices.*

CASE 1.

Hawley against Simpson.

In what case a tender before the day is good. Post. 73.

DEBT upon an obligation. The condition was, to pay at or before the 29th of September next, at such a place, ten pounds to the obligee. It was held by the court, that if the obligor tender the money the 28th day of September at the place, and the obligee is not there to receive it, it is a void tender; for the tender is to be the last day: but if the obligor meet the obligee at the place before the day, and he then tender it, this is sufficient; and the obligee ought to receive it.

Co. Lit. 211. a. 10. Co. 129. a. Moor, 122. 602. 3. Co. 92. 2. Bulst. 144. Yelv. 37. Cro. Jac. 9. 13. Co. 2. Roll. Rep. 373. 5. Bac. Abr. 9. Ld. Raym. 621.

CASE 2.

Sir William Drury's Case.

A release dated before, but made and delivered after an obligation, does not release the obligation.

2. Roll. Ab. 410.

Dyer, 56. 307.

2. Wood's Con. 233.

J. S. makes an obligation, dated and delivered the first of May; and upon the first of June following, the obligee maketh a release to the obligor, bearing date the first of March, and delivered the first of June, by which he releaseth all actions *ab origine mundi* until the date of the release. And all the Justices were of opinion, that the obligation was not released.

2. Roll. Rep. 255. Palm. 218. 2. Brownl. 300. 2. Mod. 280. 3. Mod. 181.

CASE 3.

The Earl of Bedford's Case.

If a defendant justifies as bailiff to another when he is not so, the plaintiff may reply *de son tort demesne*, and so punish him. Post. 540.

3. Co. 67. a.

1. Vent. 314.

2. Lev. 210.

3. Lev. 20.

Salk. 107.

REPLEVIN. The defendant made cognisance as bailiff to the EARL OF BEDFORD; whereas in truth he was not his bailiff, but took the distress against *his* will. It was held that the plaintiff cannot traverse that he was not his bailiff, for it is not issuable; nor can the earl disavow it, for he is not party; nor can the earl have an action on the case, because he is not damaged: but the party whose cattle are taken may bring an action of trespass for taking his cattle; and if the defendant justifieth as bailiff, he may say *de son tort demesne, et sans tiel cause*, and so punish him.

Bruerton

Bruerton against Rainsford.

CASE 4.

J. S. maketh a lease for years, to commence after the death of a tenant for life, or after the end of a lease for years in being: a stranger after the death of the tenant for life, or the end of the lease, enters by tort. It was agreed by the Court, that notwithstanding the entry, the lessee may grant over his term: but if he had entered, and been afterwards put out, he cannot grant his term till he re-entereth (a).

Ld. Ray. 728. 730. 3. Bac. Abr. 446. 10. Mod. 2. 177. 265. 12. Mod. 113. 125. 2. Barnes, 153. 5. Burr. 2830. Dougl. 455.

(a) By 21. Jac. 1. c. 16. no entry shall be made upon any man's lands, unless within twenty years after his right shall accrue; and by 4. and 5. Ann. c. 16. no entry shall be of force to satisfy the said statute, or to avoid a fine, unless an action be thereupon commenced within one year after, and prosecuted with effect.

Lord Cromwel against Andrews.

CASE 5.

ATTAIN. It was agreed by the Justices, that if there be a lessee for years rendering rent, and for not payment a re-entry, and he payeth the rent before the day to the lessor, and hath his acquittance, and at the day when the rent is due, the lessor demands it, and none is there to pay it, the condition is broken; for the payment before the day is not a payment of the rent, but of a sum in gross (b).—Secondly, It was ruled, that where a lease is made rendering rent at Michaelmas, between the hours of one and five in the afternoon, and a re-entry, &c. the lessor cometh at the day at two of the clock, and continueth demanding till five, and the rent is not paid, he may re-enter, although he was not at one of the clock, when peradventure the lessee was there, and tendereth it (c).

1. P. Wms. 178. Prec. Ch. 555.

Anonymous.

CASE 6.

NOTE, It was held *per curiam*, that if one lets a house rendering rent, and for not payment, &c. it is not sufficient to demand the rent at the door of the house if it be open, but the lessor must enter into the house, and there demand it: so if a lease be made of land, the lessor must enter into the most notorious place of the land, and there demand it. *Ex relatione* FOUNTAINE, *incerti temporis*.

Cro. Jac. 423. Co. Lit. 201. 202.

Higham against Baker.

CASE 7.

Trinity, 22. Eliz. Roll. 640.

REPLEVIN. The defendant avows for *damage feasant*. Upon a special verdict, the case was, *Thomas Higham*, the father of the plaintiff, was seised of a messuage called *Mascals*, to which no land did appertain; and being possessed of a farm called *Jaques*, to which an hundred acres of land did appertain, purchaseth the fee simple of *Jaques*, and let the said farm called *Jaques*, and sixty acres to it belonging, to *Wakefield*; and occupieth the other forty acres with *Mascals* by the space of ten years; and by his will deviseth "all his farm called *Jaques*, and the land to the same belonging, then in the tenure of *Wakefield*, to his wife for life." And deviseth further by these words, "ITEM, I will that it, and all the rest of my lands thereunto belonging, wheresoever they

A man devises lands to his wife and his youngest son by name, for payment of debts, &c. and after the death of his wife the remainder to his youngest son in fee, the wife shall have an estate for life by implication.

HIGHAM
against
BAKER.

Cro. Jac. 75.
Godb. 16.
3. Leon. 130.
2. Leon. 226.
Moor, 123.
Vaugh. 263.
1. P. Wms. 40.
473.
Prec. Ch. 439.
1. Wood's Con.
170.
Cowp. 43.
Doug. 417. 759.
Post. 300. 474.

Cro Jac. 75.
Moor, 7. 124.
Ld. Ray. 204.
Gilbert on De-
vises, 78.

Cro. Car. 308.
Post. 704.
2. Term Rep.
492. 502.

" lie, shall remain to my youngest son *Robert*, and to the heirs of
" his body, after the death of my wife." And deviseth further,
" his farm called *Mascals*, and the lands to the same belonging, to
" *Alice* his wife, and the said *Robert*, for payment of his debts,
" and performance of his legacies; and that after the death of his
" wife, all the said farm called *Mascals*, with the lands to the
" same belonging, shall remain to *Robert* in fee." It was averred,
that the debts and legacies were paid, and the taking was in the forty
acres which were occupied with *Mascals*.—The Justices held clearly,
that, by the first part of the will, the wife had nothing in the forty
acres; for the devise to her was of " the farm of *Jaques*, and the land
" to it belonging, then in the tenure of *Wakefield*;" although he
saith afterwards, " that it, and the rest of the lands thereunto be-
" longing, wheresoever they lie, shall be to *Robert* my son, &c.
" after the death of my wife." Admit that the forty acres shall
be said to pertain to *Jaques*, yet the wife shall take nothing in them
by implication, and *Robert* shall have nothing in them during the
life of the wife, but the eldest son shall have them by descent
during her life; and what she shall have, was expressly devised to
her before, and so shall not have any more by implication.—
MEADE said, it was adjudged in *Glover v. Clatches*, upon reason,
that where a devise was to one and the heirs males of his body,
and if he died without issue of his body, remainder over; if he
died without issue male, having issue female, she shall not take by
implication.—ANDERSON, C. J. said, he heard *Sir Anthony*
Browne rule this case, That where a man deviseth lands to his
wife, and deviseth other lands to a stranger after the death of his
wife, she shall not have those lands by implication; for when any
thing was given by express words, it shall not be intended that the
devisor intended the other land by implication: for it is to be sup-
posed, if he had so intended, he would have given it before ex-
pressly; and the forty acres cannot pass by the first part of the will
to *Robert*, for the forty acres were severed from *Jaques*, and con-
joined and occupied with *Mascals*. At this day nothing was
spoken to the second part of the will, for the serjeants only recit-
ed the first part; but at another day the record was read before
them, and all the matter then appeared as it is at first recited. All
the Justices held, that it appeareth by the latter part of the will,
that the testator did never intend to pass those forty acres as parcel
of *Jaques*, but he reputed them as parcel of *Mascals*. ANDERSON,
C. J. said, that land shall pass as pertaining to a house which hath
been occupied with it by the space of ten or twelve years, for by
that time it has gained the name of parcel or belonging, and shall
pass with the house by that name in a will or lease, &c. And here
by this second part of the will, the wife and *Robert* have a joint
estate till all the debts and legacies are paid; which being averred
to be paid, that estate doth cease, as it was lately adjudged in the
queen's bench: and when it is limited over, that *Robert* shall
have it after the death of the wife, the wife shall have the entire
estate for her life; and after her decease, *Robert* shall have it in
fee.—Afterwards judgment was commanded to be entered for
Baker, the avowant, (who had married the wife) to have return;
for the same by the second limitation had the entire estate; and in
the forty acres the taking was supposed.

Ashborough's Case.

CASE 8.

FENNER said, it was adjudged in that case, 18. *Eliz.* that if the sheriff assign dower by writ to him directed, and doth not return the writ, yet she is lawfully seised in dower; but it is otherwise in a partition by writ, for there a second judgment ought to be given.

PERIAM said, it was adjudged in *Clipton's case*, after he came to the bench, that if the sheriff take one by *capias ad satisfaciendum* in debt, if he after permitteth him to go at large, and returneth not the writ, debt lieth upon this escape against him; for there is a record of which the party shall take advantage, though the writ be not returned.

Dower is well assigned tho' the sheriff does not return the writ.

Moor, 209.
4. Co. 67. a.

Anonymus.

CASE 9.

FRANCIS GAWDY moved this case. A fine was levied with a render; the render was with warranty; and the officers of the fine refused to take it by reason of the warranty annexed, which had not been known before time. But all the Justices conceived it was good; for although it was not usual that he which renders should warrant the land, because he taketh no benefit, yet if he will warrant it, it is not to be doubted, but it is good enough: and the officers were commanded to receive the fine.

In levying a fine the person who renders may make the warranty.

Post. 650.

Thomas Foster and others against Spooner and Aford.

CASE 10.

WASTE. The place WHERE, was *Wallingford Park*. Spooner, one of the defendants, made default at the grand distress, and thereupon against him the inquest was awarded to enquire of the waste and damages. Aford pleads, he had nothing in the trees in which the waste was supposed, and upon this they were at issue. Upon evidence the case appeared to be, that *Shelly*, being lessee for years of the park, grants all his interest and title in the said lease to Aford, saving and excepting all the wood and underwood growing upon the land; and if upon this matter *Shelly* shall be said to be lessee of the wood, against whom the action of waste shall be brought, or Aford, was the question. The serjeants of the plaintiffs part said, notwithstanding this exception, it is a good grant of *Shelly* to Aford of the wood, for he that made the exception had no interest in the trees, being only lessee for years, and so the exception void; and in this action the land is to be recovered as well as damages; and if Aford be not the lessee, the plaintiffs cannot know against whom to bring the action, for *Shelly* hath only the trees and not the land, and so no action against him.—ANDERSON, C. J. and MEADE held, that the action shall be brought against *Shelly*, for the trees passed not to Aford; for the interest in them that *Shelly* had he hath reserved, so as he shall have all the profit of them, as if hernes, &c. breed in them, &c. ANDERSON said, as to what was said, that *Shelly* had no property in the trees by the common law, the lessee had interest in the trees, and the statute does not take it away, but prohibits him that he shall do no waste, and makes him punishable for it: and as to the objection, that they can recover no land,

If a lessor reserve the wood upon the demised premises, he may justify an entry to cut it down and carry it away. But *quæro* if a lessee can make such a reservation to an under-tenant?

2. Inst. 302.
1. Leon. 49.
11. Co. 48. b.
1. Saund. 322.
1. Term R. 56.

Co. 11. 48. b.

FOSTER
against
AFORD, &c.

and so no action of waste lieth; if a man lets the trees of his park, waste lieth against the lessee for cutting of them; and if an action of waste doth not lie, yet he may have an action upon his case; and to this opinion WYNDHAM seemed to agree. PERIAM held strongly the contrary, that the exception was void by a lessee for years, for he hath no interest in the trees, and neither at common law or since the statute, is the property of trees in the lessee; and although before the statute there was no law to punish him, yet that doth not prove he might lawfully cut them: and at this day, if the lessor cuts down the trees and takes them away, the lessee shall not recover according to the value of the trees, but for the entry, &c. which case MEADE agreed; and because the Court was divided, they commanded the jury to find the special matter, and to leave it to the discretion of the Court. In this case it was affirmed by them all, that if a man maketh a lease, reserving the wood, &c. he may justify the entry to cut them and carry them away.—And it was held by all the prothonotaries in this case, that if the defendant in a writ of waste loseth by default at the grand distress, enquiry shall be made of the waste, and to what damages; but if he loses by confession or *nient dedire*, or by pleading *non sum informatus*, &c. the waste shall not be enquired, but only the damages: and so it was done in this case; for as to *Spooner*, they were commanded to enquire of the waste and damages; and as to *Aford*, of the damages only. *NOTA*, 5. Co. 12. cited it to be adjudged, that the exception was void, and that waste lay against the assignee. *Vide Coke's Entries*, 695. the whole record of the case, but no judgment.

11. Co. 52. a.

On default in a writ of waste, the sheriff shall enquire of the waste and damages; but on judgment after appearance, of the damages only.

Post. 263. 290.

Cro. Jac. 296.

F N. B. 55.

Poph. 24. 3. Black. Com. 228.

CASE 11.

Higgins against Grant.

The grant of a manor will not pass an advowson appendant

without saying *cum pertinentiis*. Post. 340. Co. Lit. 77. a. 307. a. Plowd. 252. 1. Saund. 323. Dyer, 350.

10. Co. 64. 12. Co. 5.

A lease by a parson made before 13. Eliz. c. 10. held good, tho' not confirmed till after.

Co. Lit. 44.

5. Co. 15.

3. Co. 65.

Cro. Car. 38.

Cro. Jac. 53.

3. Ba. Ab. 375

389. 393.

EJECTIONE FIRMÆ. Upon evidence to the jury the justices said, if one doth demise a manor to which an advowson is appendant, and saith not *cum pertinentiis*, the advowson doth not pass.

IN this case the plaintiff claimed under a lease made by *R. Stake*, parson of *Shenly*, 11. Eliz. and that *Ms. Poultny* being patron in reversion in fee, confirmed the lease; and after the 13. Eliz. c. 10. viz. in 14. Eliz. the ordinary confirmed it; and 23. Eliz. he who had the patronage in right of his wife, together with his wife, confirmed the lease; and all these confirmations were shewn; and it was averred, that the patroness for life was living.—THE JUSTICES held, that the confirmation by the ordinary and patrons were good; for the statute doth speak of alienations, &c. by incumbents to be void after the statute, but doth not make void confirmations made of a lease before the statute.

Pleading in ejectment on a church lease.

Post. 154.

Dough. 573.

THE plaintiff did declare of a lease by the parson, but doth not aver his life, and by his death the lease is void, and no acceptance can make it good; and the plaintiff pleaded a confirmation by the patron for life, and sheweth not how the patron came to this particular estate.—THE JUSTICES held, that he needed not shew what estate the patron had, but when he did shew he hath but an estate for life, he ought to shew how he came to it.

Harris and Haies *against* Nichols.

CASE 12.

QUARE IMPEDIT. It was held by MEAD, WYNDHAM; and PERIAM, *Justices*, that if two co-parceners be of an advowson, and they severally grant their parts to two several men, the advantage that was between the parceners doth hold place between the grantees, as the first presentment shall go to the grantee of the eldest, and so of the others; and an usurpation of one shall not put the others out of possession. 22. *Edw.* 4. But they said, peradventure it shall be otherwise, if they were mere tenants in common, and did not derive their estates from co-parceners; and yet the book in 22. *Edw.* 3. pl. 9. that between strangers in blood, or where two make composition to present by turn, if one usurp upon the turn of the other, this shall not put him out of possession.—ANDERSON, C. J. doubted, but he agreed that tenant by the courtesy shall have the same advantage that his wife should have had.

If co-parceners assign their parts of an advowson severally, the grantees shall present by turns. Co. Lit. 186. b. 3. Co. 22. b. 2. Inst. 365. 2. Roll. Ab. 346. Keilway, 49. See Hargrave's note [2]. Co. Lit. 186. b; the 7. Ann. c. 18. and 8. and, 9. Will. and Mar. c. 31.

It was held by MEADE and WYNDHAM, *Justices*, that if a man hath a manor which doth extend into two towns, and he grants the demesnes and services in one town, the grantee hath a manor in that town, and he may keep court, and so hath the grantor a manor in the other town, and may keep court there.

A manor may be divided by grant of parcel. Post. 39. 2. Roll. Ab. 122. Owen, 138. 1. Bulst. 54.

Anonymous.

CASE 13.

ACCOMPT. The defendant was adjudged to accompt, and a *Default* before *auditors* *ad computandum* issued against him to accompt, before auditors at a certain day, at which day he appeared and entered to accompt; and the auditors assigned them to appear before them at another day certain, at which day the plaintiff did not proceed. FENNER moved what shall be done in this case, if he shall be nonsuited, or barred of accompt, or if the action be discontinued. The Court demanded of the prothonotaries, who said, there can be no nonsuit, because it is after judgment, but that a discontinuance shall be entered, and the defendant and his sureties put without day; and if the plaintiff will after proceed upon this accompt, he shall have a *scire facias* upon this record *ad computandum*; and so the Justices did award in this case.

Default before auditors is a discontinuance, for there can be no nonsuit after judgment; but the cause may be revived by *scire facias*.

Co. Lit. 139. b. 11. Co. 38. a. Andrews, 29.

Lutwich *against* Hussey.

CASE 14.

ASSUMPSIT. The plaintiff declared, that whereas the defendant was indebted to the plaintiff, and the father of the defendant being also indebted to the plaintiff in another sum, he did promise, that if the plaintiff *paululum cessaret* to demand the debt which he did owe to him, that he would pay both the debts; and shewed that upon this promise he did forbear the demand of his money for half-a-year, and for not payment of the debt of the other the action was brought, and it was upon the issue found for the plaintiff. And it was alledged in arrest of judgment, that there was no consideration of the promise, for it is not said for

Forbearance for a short time, is not a good consideration.

Post. 455. 665. 759. 1. Roll. Abr. 23. 27. Cro. Jac. 250. Cro. Car. 241. 1. Lec. 61. 1. Sid. 45. how Cowp. 129.

LUTWICH
against
HUSSEY.

how long he should forbear ; for if he did forbear for a quarter of an hour or less, he hath performed the word, *quod paululum cessaret*; and although the plaintiff doth alledge he did forbear for half-a-year, this will not help the case. And of that opinion were the Justices; and commanded, if no other matter be shewn before the end of the term, *quod nihil capiat per breve*.

CASE 15.

Pollard against Scholy.

A *bona fide* contract shall not be avoided by a subsequent agreement to take more fee for forbearance than legal interest.

Moor, 398.
Cro. Jac. 508.
1. Saund. 294.
1. Mod. 29.
2. Mod. 307.
5. Bac. Ab. 408.
Ray. 197.
1. Vent. 38.
Cowp. 112.
1. Hawk. 528.
Dougl. 235.

DEBT. The case was, *Pollard* sold to the defendant two oxen, 22d June, 22. *Eliz.* for six pounds six shillings and eight pence, to be paid at All Saints next; and at the same day *Scholy* required of him a longer day for payment, &c. and *Pollard* gave him till the first day of May next, paying to him for the forbearance of his money three quarters of wheat, which was above the value of ten pounds *per annum* for an hundred pounds, according to the 13. *Eliz.* c. 8. §. 5. (a): and the defendant in debt for the six pounds six shillings and eight pence doth plead this, and would avoid the contract.—The opinion of the Justices was, that the statute doth not make the contract void, which was duly made, but doth only avoid all contracts for usury; and this last contract is void, being against the statute; but the first was good, being made *bonâ fide*.—**NOTA,** *Hill. Term*, 20. *Eliz.* B. R. in an information by *Mallory v. Bird*. If one contracts to have twenty pounds for the loan of an hundred pounds, if he taketh nothing of the twenty pounds, he is not punishable by the statute; but if he taketh any thing, if but one shilling, this is an affirmance of the contract, and he shall render for the whole contract.

(a) See 12. Ann. st. 2, c. 16.

CASE 16.

Beauchamp against Dale.

If a disseisor leases to a disseesee for life, the disseesee shall be in by remitter.

Co. Lit. 363. b.
3. C. Dig. 419.

QUO MINUS. It was adjudged, after argument and deliberation, that where a disseisor letteth the land to the disseesee for life by indenture, that this is a remitter to him, for by this he confesseth the deed; but by his entry to take livery, the law hath its operation, and doth remit him against his own acceptance; (*ex relatione JOHANNIS HEALE, who argued this case;*) and it was adjudged upon conference between the Barons and all the Justices.

Trinity Term,

25. Eliz. In the Common Pleas.

Sir Edmund Anderson, *Knt. Chief Justice.*

Sir William Periam, *Knt.*

Thomas Meade, *Esq.*

Hugh Wyndham, *Esq.*

} *Justices.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

Webb against Neft.

Hillary Term, 24. Eliz. Roll 410.

CASE 1.

THE case was, *Hugh Bury*, seised of divers manors in the county of *Devon*, by his deed indented and enrolled between him of the one part, *Robert Kemp* and *Nicholas Adams* of the other part, in consideration of twenty pounds paid by the said *Robert* and *Nicholas*, bargained and sold the said manors to the said *Robert* and his heirs, to the intent that the said *Robert* should suffer the said *Nicholas* and *H. Gifford* to recover the said manors against him, which should be to the use of the said *Hugh Bury* for life, remainder to his son in tail, with divers remainders over; which recovery was accordingly suffered, *Haward* and *Brook* being then tenants of the freehold of the said manors, the reversion to him against whom the recovery was; afterwards *Haward* and *Brook* die, *Hugh Bury* enters, and let to the plaintiff, &c.

Tenant in fee simple, expectant upon an estate for life, bargains and sells to *A.* who is made tenant to the *præcipe*, and he vouches the tenant in fee. This recovery (to the use of the *reversioner* for life, remainder in tail) is good against him by estoppel.

Two points were moved. *First*, If the uses expressed in the indenture of bargain and sale were good? *Secondly*, If the recovery suffered against him in the reversion where the freehold was in a stranger, shall bind the reversioner and his heirs?

The COURT held clearly as to the first point, that the limitation to the uses, as this case is, was good. *Secondly*, That the recovery is good against him in the reversion and his heirs: and they commanded judgment to be entered accordingly (a).

(a) See 14. Geo. 2. c. 20.

Godb. 141.
4. Leon. 238.
1. Wood's Con. 604.
Pigot on Recov. 33. 200.
Cowp. 704.
2. Term Rep. 171.
Post. 670. c.
Co. 36. b.

Anonymous.

CASE 2.

THE case was, The lord granted the freehold of a copyhold to a stranger; the copyholder being in possession releaseth to the grantee all his right in the land; the question was, If this doth extinguish the copyhold?

ANDERSON, C. J. held it did not, and said, it was adjudged that if tenant for life releaseth to him in the reversion, this is void; for it cannot inure as a release, for he is in possession; nor can it inure

A release by a copyholder to the lord's grantee of the freehold is an extinguishment of the copy.
Ante 7. Hutt. 31.
25 Jones 41.

ANONYMOUS. as a surrender, for want of fit words; so of lessee for years, *Dyer*, 251. and it is so in this case.

1. Hob. 898.

1. Leon. 102.

Cro. Jac. 169.

1. Lev. 145.

1. Bac. Ab. 481.

2. Bac. Ab. 451.

Glib. Ten. 301.

But SNAGG, *serjeant*, said, he knew it to be ruled in a case of great importance, that notwithstanding the words will not amount to a surrender, yet the consent and agreement of the lessee, which is proved by the deed, will amount to a surrender.

CASE 3.

Anonymous.

Bail are discharged by the surrender of the principal; but the plaintiff may either have a *ca. sa.* or a *fi. sa.*

A MAN condemned in debt renders himself to the court, and prayeth his sureties may be discharged. The plaintiff was demanded, for the Court said he may elect either his body, or to take his goods in execution; but by this offer the sureties were discharged (a).

1. Crompt. p. 70.

4. Burr. 339. 499. Comb. 263. 2. Term Rep. 747.

(a) Bail are discharged if the defendant becomes a *par* pending the action. Dougl. 43.

CASE 4.

Sir John Souch's Case.

Re-entry for non-payment of rent to a suspected stranger, without written authority, good.

HE made a lease for years, rendering rent, and a re-entry for non-payment, and at the day a stranger came to demand the rent. The lessee demanded of him what authority he had of the lessor to demand it; and because he was a cozening fellow, and one that was notoriously infamous, and would not shew any authority, the lessee would not pay the rent; and thereupon the lessor entered; and his entry adjudged lawful, for a command to receive rent may be *per parols*.

Post. 813.

Moor. 141.

5. Co. 76.

Hob. 154. Dyer, 222. Cro. Jac. 178. Owen, 23. Dougl. 483.

CASE 5.

Anonymous.

A man may avow for rent on a lease to a *que esset*, without shewing all the mean assignments.

AUDITA QUERELA. The question was, if the conusor shall be compelled to make mention of all the mean assignments of the conusee, &c. And the Court doubted.

ANDERSON, C. J. said, that in the time of *Lord Dyer* the case was, that lessee for years assigned over his term, and there were divers mean assignments. In debt for the rent he ought to make mention of all the mean assignments; and because the plaintiff could not do it, he was compelled to distrain and avow for the rent, for he cannot say he let the land to one whose estate the defendant hath: so it is in waste.

Co. Lit. 121. a.

303.

1. Sid. 297.

1. Saund. 112.

Cro. Car. 190.

2. Salk. 562.

Dougl. 667. 3. Term Rep. 147.

CASE 6.

More's Case.

Judgment given in debt on a determinate contract, although the plaintiff declared for more than he proved.

DEBT. The plaintiff declared, that the defendant had bargained with him to give him for the pasturing of every horse by the night two-pence, and of every ox one penny half-penny, and sheweth that he had pastured seventy horses and three hundred oxen; *et ideo actio accrevit* to demand, &c. And he demanded more than upon his own shewing it appeared he should have, for the number of the

years, Dyer,
in a case of
not amount
lessee, which

the horses and oxen did not amount to the sum of which he had counted. This was alledged in arrest of judgment, after verdict found for the plaintiff; and, notwithstanding, judgment was given for the plaintiff.

MORE'S CASE,
Post. 80. 292.
Sed vide contra
Moor, 298.
Yelv. 5.
Litch. 175.
5. Mod. 214.
Cro. Jac. 128.
247. 449. 569.

But FENNER said, that in *Anslow's Case*, who brought a writ of annuity, and demanded twenty nobles; and it appeared by his own shewing, that he was to have but nineteen nobles.—The writ was abated by award of the Court.

3. Black. Ccm. 154. Cowp. 766. Dougl. 377. 1. Term Rep. 447. 2. Term Rep. 29.

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Audley against Suttrel.

CASE 7.

EJECTIONE FIRMÆ. The defendant challenged the array, because the sheriff was cousin to the plaintiff, which was confessed; but it was said, that the sheriff is as near of kin to the defendant: and upon this it was demurred, and by advice the array was quashed.

An array quashed for affinity.
Co. Lit. 156. 2.
Post. 663.

on. Dougl. 45

Anonymous.

CASE 8.

DEBT against an executor, who pleaded he had *riens in ses maines*, but certain goods, distrained and impounded: it was adjudged to be no assets to charge him.

Goods impounded are not assets.

Co. Lit. 47. 2. Bac. Abr. 417. 1. Wood Con. 139.

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Hilary Term,

26, Eliz. In the Common Pleas.

Sir Edmund Anderson, *Knt. Chief Justice.*Sir William Periam, *Knt.*Thomas Meade, *Esq.*Hugh Wyndham, *Esq.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*} *Justices.*

CASE 1.

Chamberlaine's Case.

Repleader
awarded.

Dougl. 396. 747.

AVOWRY for rent, and made title to it, as coufin and heir to Robert Chamberlaine, that is to say, son of Anne, daughter of Robert, and for rent arrear for sixteen years after the death of Anne he avowed: and because he made title to it immediately as heir of Robert, and after avoweth for rent after the death of Anne, which cannot be, for it shall be intended that she died in the life of Robert, and issue being joined upon another matter, they were awarded to RE-PLEAD.

CASE 2.

Wharton against Morley.

Grant to the
King good
without being
inrolled.

Dougl. 36.

COKE shewed to me a report, which he said he had from Edmund Plowden, of a judgment in the exchequer, 7. *Eliz.* between the said parties, that whereas a prebend did give and grant his land to king Edward the sixth, and this deed was not enrolled, yet the grant was good, and vested the land in the king, by the proviso in the end of 1. *Edw. 6. c. 14. f. 42.*; for although it was not good at common law, yet the statute doth make it good, or else the statute were in vain.

CASE 3.

Stockbridge's Case.

If a copyhold
estate be con-
verted into a
freehold, it is
within the pro-
tection of 11
Hen. 7. c. 20.
Ante, 2.
Post. 510. 544.
Gilb. Ten. 181

THE case was, *Baron and feme* copyholders, to them and their heirs. The *baron*, in consideration of money paid by him to the lord, obtaineth an estate of the freehold to him and his wife, and to the heirs of their bodies. The *baron* dieth, having issue. The *feme* enters, and suffers a common recovery, and his heir enters by the statute of 11. *Hen. 7. c. 20. (a)*: and agreed the entry was lawful; for the copyhold, by the acceptance of the new estate, was extinguished.

903. *Hob. 176.* 2. *Sid. 41. 73.* 4. *Mod. 45.* 2. *Bac. Abr. 93. in notis.* 1. *Salk. 185.*

(a) Confirmed by 32. *Hen. 8. c. 34.*

Easter

Easter Term,

26. Eliz. In the Common Pleas.

Sir Edmund Anderfon, Knt. Chief Juſtice.

Sir William Periam, Knt.

Thomas Meade, Eſq.

Hugh Wyndham, Eſq.

Sir John Popham, Knt. Attorney General.

Sir Thomas Egerton, Knt. Solicitor General.

} *Juſtices.*

Gibbon *againſt* Cordell.

CASE 1.

EJECTIONE FIRMÆ. The caſe, upon ſpecial verdiſt, was, *Heydon* was ſeiſed of the houſe and land in queſtion, and came to *Cordell* to borrow 20 l. of him, and for aſſurance of the money, offered him the houſe and land in queſtion; and thereupon they agreed, and went to the houſe, and *Heydon* called the tenants of the houſe, who were tenants at will, and ſaid, "Sirs, I have ſold my houſe and land to *Cordell* for twenty pound, "if I pay him not the money at ſuch a day; and if I pay him the money, I ſhall have the land; and if I pay it not, then I clearly bargain and ſell them to him;" and puts *Cordell* into the houſe, and locks the doors, and delivereth him the keys, and ſaid to the tenants, "*Take him for your maſter.*" It was argued by GODFREY and SNAGG, and afterward adjudged it was a good livery, and an eſtate for life, at the leaſt, paſſed: but if a fee paſſed, it was not queſtioned, becauſe *Cordell* was alive.

How a livery in deed of land may be made.
1. Leon. 18.
Moor, 144.
236.
Co. Litt. 486.
1. Wood's
Con. 516.
2. Term Rep. 739.

Dowſe's Caſe.

CASE 2.

ALEASE was made to *A. B.* and *C.* for their lives, *habendum* to *A.* for life, the remainder to *B.* for life, the remainder to *C.* for life. It was adjudged a good limitation, and they ſhall take according to the *habendum*; for in the *premises* a joint-eſtate is given only by implication, which is controlled by the expreſs limitation in the *habendum*.

The *premises* of a leaſe controuled by the *habendum*.
Co. Lit. 183. b.
Poſt. 89.

Fiſher *againſt* Banks.

CASE 3.

AUDITA QUERELA, for that the plaintiff was in execution in debt upon an obligation, and alledgeth it was made for uſury-money, contrary to 13. Eliz. c. 8. And becauſe it did appear to the Court, that he was condemned upon a *nihil dicit* after he had made an attorney and appeared; ſo that he might have pleaded this plea in avoidance of the obligation, and then did not plead it. The *audita querela* was diſallowed by the whole Court; for an *audita querela* doth not lie after judgment, upon a thing he might have pleaded before; but when he is condemned by default,

An *audita querela* will not lie for what might have been pleaded before.
Ante, 4.
2. Roll. Abr. 306.
1. Sid. 55.
Salk. 93.
Carth. 278.
2. Lut. 1143.
1174.
Cowp. 728.

FIFTER
against
BANKS.

and had no day in court to plead it, there it lieth: And they said, upon this reason they had over-ruled a like case this term.

CASE 4.

An administrator is in law an assignee.
Post. 657.
Co. Lit. 210. 2.
1. Wood's
Cous. 280. Dougl. 184.

Sir William More's Case.

A LEASE is made for years upon condition that the lessee, his executors, or assigns, shall not alien without assent of the lessor. The lessee dieth intestate, and the ordinary grants administration to J. S. who assigneth without licence. It was adjudged, that the condition was broken, for he is an assignee in law.

CASE 5.

Lee against Vincent.

Easter Term, 26. Eliz. Roll 371.

If a devise be that the testator's sons in law shall sell the land, and one of them dies before the testator, a sale by the two survivors is good.
Post. 80. 325.
856.
S. C. Dyer, 176. 219.
Co. Lit. 113. 2.
1. Leon. 285.
3. Leon. 106.
1. And. 145.
1. Roll. Ab. 328.
Moor, 147.
Cro. Car. 382.
Fo. on Dev. 297.

THE case was, John Lee devised his land to William his son in tail, and if he depart without issue, that his sons in law shall sell it (having then five sons in law) and dieth; and after one of his sons in law dieth, then William dieth, having issue a daughter, and afterward the daughter dieth without issue, the four sons in law that survive sell it. The question was, If this sale were good? —GEORGE WYAT argued for the plaintiff, and GODFREY for the defendant. The points were two. First, For that the son died, having issue, although the issue died without issue, if the sale be good. Secondly, One of the sons in law was dead, and being an authority, it cannot survive. But it was adjudged a good sale, because he named them not by their proper names. GODFREY said, it was adjudged, 4. Eliz. where one devised his land to his wife for life, the remainder to his son in tail, and if his son dieth without issue, that his executors shall sell the land by the advice of A. and B. and A. dieth in the life of the son, the sale after the death of A. is not good; but if A. had assented in his life-time, it had been good.

Roe against Hartly.

Writ of error does not lie in C. B. upon judgments in inferior courts.
1 Roll. Ab. 745.

IT was held by all the Justices, that a writ of error doth not lie in the common pleas, upon an erroneous judgment given in any inferior court of record. And this was, as they said, upon great advice. F. N. B. Cont. 20. D. v. 8. Eliz. Dyer, 250.

1 Roll. Ab. 745. Moor, 78. 1. Leon. 55. 3. Leon. 159. Dyer, 250. And. 12. Cart. 222.

CASE 7.

Griffith against Morison.

Words actionable.
Post. 31.

ACTION for these words, "Where is that bankrupt knave? where is that pillory knave?" (innuendo the plaintiff) and averred he was a merchant; and the words were adjudged actionable.

CASE

Mayor and Burgesses of Windsor's Case.

A sheriff cannot be sued for the escape of a prisoner who was never in his custody.

ACAPIAS ADSATISFACIENDUM was awarded to the sheriff of Berks to arrest J. S. who was then in custody of the Mayor and Burgesses of Windsor; and thereupon the sheriff awarded a warrant to the Mayor, &c. to take him, and afterward they let him escape; and it was held clearly, that debt upon the escape lieth against them, and not against the sheriff. So it is of a bailiff of a franchise.

Post. 158 743. Dalt. Sher. 560. Cowp. 63. 2. Term Rep. 3. 126.

Edison

Eaton against Wood.

CASE 9.

THE case was, The defendant covenanted by indenture with the plaintiff, that whereas he intended to marry *Elizabeth Smalwell*, a widow, that he would pay all the legacies which she by her last will in writing, bearing date 1st May, 20th *Elizabeth*, did give and bequeath, and was bound by obligation to perform the covenants in the indenture. In debt upon the obligation, the defendant pleaded, that after the making of the will and the obligation, he intermarried with the said *Elizabeth Smalwell*, which marriage continued till her death, so the will and devise of *Elizabeth* was void; and demanded judgment, &c. And it was adjudged, that the plaintiff shall recover; for notwithstanding it was not a will to all intents and purposes, yet the indenture referreth to that which did bear the name of a will; and although it was not a will in deed, it is not material.

11. Mod. 221. 1. Vern. 244. 408. 2. Vern. 329. Prec. Ch. 44. 84. 255. 2. Peer Wms. 82. 144. 1243. 316. 341. 364. 496. 1. Peer Wms. 126. 2. Stra. 891. 1111. Eq. Caf. Ab. 66. 171. Ld. Ray. 513. Dougl. 708. Cowp. 260. 2. Term Rep. 635. 2. Brown C. C. 377. 319.

The Bishop of Hereford's Case.

CASE 10.

QUARE IMPEDIT. The case was, The patron presented *S.* to the bishop, who gave notice to the patron that the clerk was insufficient; and thereupon the patron presented another clerk, and the bishop admits the first that was presented by the patron, and within the six months. The COURT held clearly, that the bishop was a disturber; for he having once refused him for insufficiency, cannot afterwards accept him.

Tanfield against Finch.

CASE 11.

INFORMATION upon the 13. *Eliz.* c. 8. f. 5. (a), for usury. It was held by all the Justices, upon evidence to the jury, *Finch* gave to *Tanfield* 566l. for an annuity of 120l. during twenty-three years. This is clearly no usury when there was no communication before between them, to have any consideration for the loan of the 566l. for this annuity was purchased *bona fide* without any corrupt intent or bargain: and if it had been 40l. *per annum* for forty years, for 100l. it had been no usury, no more than if one for 100l. purchase lands worth 40l. *per annum*.

Another matter was in this case: That after the grant of the said annuity of 120l. for twenty-three years for the said 566l. in hand paid, *Tanfield*, for the assurance of the said annuity, infeoffed *Finch* of land worth 100l. *per annum* to the use of *Tanfield* and his heirs, upon condition, that if the money were not paid, it should be to the use of *Finch* in fee. And all the Justices held it was no usury; for the mortgage was only for the assurance of the annuity.

NOTA, In *Doctor Goad's case*, *Trin.* 19. *Eliz.* in the exchequer in an information for usury, *POPHAM* and *FLOWDEN* held, That if a man giveth 100l. for an annuity of 20l. *per annum*, this is not usury, for he shall never have his stock of 100l. again. But *BELL*,

Chief

TANFIELD
against
FINCH.
(a) See 12. Ann.
11. 2. c. 16.

Chief Baron, held clearly, if two men speak together, and one of them desireth the other to lend him 100l. and for the loan of it he will give him above 10l. *per annum* (a); and for an evasion out of the statute, they invent this practice, that he shall grant to the other 30l. *per annum*, out of his land for ten years; or he shall make a lease for one hundred years to him, and the lessee shall regrant it to him, upon condition he shall pay 30l. yearly, and every year during the ten years: in this case, the first contract being corrupt in fraud of the statute, this is usury, although he never hath his 100l. again. But if *bonâ fide* one buyeth an annuity of 40l. for ten years for 100l. this is no usury, if the first communication was not corrupt. *Ex relatione* EDWARD. COKE.

CASE 12.

Thomas Mantell against Matthew Mantell.

In the Exchequer Chamber.

Forfeiture for
high treason.

THE case was long debated in the common bench, and afterwards brought into the exchequer chamber by English bill. *Oliver Wood* being *cestuy que use* in fee of the manors of *Milton* and *Collingtree*, in the county of *Northampton*, 13. *Hen.* 8. by his last will devised, that his feoffees after his death should stand seised of the manors to the use of *Sir Walter Mantell* and *Margaret* his wife, the daughter and heir apparent of the said *Oliver*, for term of their lives; and after their decease, to the use of *John Mantell*, their son, and of the heirs of his body; and for want of such issue, to the use of the heirs-males of the body of the said *Sir Walter* and *Margaret*, which they shall afterwards lawfully have, with divers remainders over. *Oliver* dieth 13. *Hen.* 8. and afterwards *Sir Walter* and *Margaret* have issue *Walter* and *Thomas*. *Sir Walter* dieth 21. *Hen.* 8. Afterward *John Mantell* dieth without issue, *Margaret* his mother living; and afterward the said *Walter*, the second son of *Sir Walter* and *Margaret* (having issue the defendant *Matthew*) was attainted of high treason, and executed 1. *Marie*. The 9. *Eliz.* Dame *Margaret Mantell* dieth, having no other issue; and the plaintiff supposing the land was forfeited by the attainder of *Walter* the son, obtaineth a grant of the same from the queen by her letters patents, and sued the said *Matthew* for entering and claiming the manors as to him descended, as cousin and heir of the said *Sir Walter* and *Margaret*, that is to say, son of the said *Walter*, son of the said *Sir Walter* and *Margaret*. And upon the whole matter disclosed, it was, 27th *May*, in the said term, decreed by the Lord Treasurer and all the Barons, that the title of the said *Matthew* was good, and the land was not forfeited by the attainder of *Walter*, he being executed in the life of *Margaret*, who only, as long as she lived, was tenant in tail; and this land did descend to *Matthew*, as cousin and heir of the body of *Margaret*, &c. *Vide* 3. *Co.* 10. the Lord Lumley's case.

Co. Lit. 392. a.

Trinity Term,

26. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*

Sir Thomas Gawdy, *Knt.*

John Clinch, *Esq.*

} *Justices.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

Rice Clampe against Edmund Clampe.

CASE 1.

REPLEVIN. The defendant avowed for damage-feasant in the land, which is parcel of the manor of *C.*; and that this land was copyhold, parcel of the said manor, and of the nature of borough English, and demised to *John Boreman* and *Margaret* his wife, and their heirs, by copy of court rolls by the name of a *messe*, containing twelve acres of land; and that *John Boreman* died, and *Margaret* him survived, and took to husband *John Clampe*, and had issue, the plaintiff, their eldest son, and the avowant, their youngest son; and afterward *Margaret* died seised, and the land descended to the avowant, as youngest son and heir, by the custom, &c. who entered and took the cattle damage-feasant. The plaintiff, by replication, confesses the grant to *John Boreman* and *Margaret*, and that *John Boreman* died, and *Margaret* survived, &c. and took to husband the said *John Clampe*, and had issue the plaintiff and defendant; but said, that the said *John Clampe* and *Margaret* surrendered the said land *per nomen* of the reversion, after the death of the said *John Clampe* and *Margaret*, to the use of the plaintiff and his heirs, who was admitted accordingly; and afterwards the said *Margaret* died, and *John Clampe* did survive; and afterwards the said *John Clampe* died, the plaintiff entered *ABSQUE* *HOC*; that the said land did descend to the defendant, as *puisse* son, &c. And upon this replication, it was demurred in law.—*COKE*, for the avowant, prayed judgment. *First*, For the matter in law, the plaintiff's plea is not sufficient; for he pleaded a surrender of the land by the name of a reversion, after the death of the *baron* and *feme*; and by that pretence, there shall be a particular estate left in the *feme* and also in the *baron*; whereas the *baron* had nothing before, which cannot be; for the surrender is void. For when one is seised in fee, he cannot by any matter in *fact* give away the inheritance after his death, and so leave a particular estate in himself; but peradventure it may be done by matter of record; and of that opinion was the Court, 38. *Hen. 6.* 8. *Hen. 7.* and it is absurd, that by a mere grant the *baron* should have an estate for life, who had nothing before. *Secondly*, He said there was an apparent fault in the pleading; for the avowant pleads, that *Margaret*

To an avowry for copyhold lands by descent of the seisin of *A.*; a replication that *A.* and *B.* surrendered the land by the name of "the reversion," after the death of the said *A.* and *B.* to the use of the plaintiff, is bad; for *B.* had nothing, and it leaves a particular estate in *A.*; and the seisin should have been transferred. Post. 225. Hob. 171. Cro. Jac. 376. 1. Burr. 272. 274. Roll. Rep. 109. Godb. 264. 4. Leon. 3. Roll. Rep. 254. 1. Roll. Ab. 323. Gilb. Ten. 260.

11. Co. 10. a.

CLAMPE
against
CLAMPE.

Post. 89.

garet died seised, and the land descended to him ; and the plaintiff in his replication traversed the descent, and not the dying seised. 14. Hen. 8. pl. 23. And the avowant had judgment at the end of the term.—NOTA, It was moved, that the twelve acres could not pass by the name of a *meise* ; but the Court gave no regard to it.

CASE 3.

Herring against Blacklow.

Easter Term, 26. Eliz. Roll 441.

If the defendant alleges *seisin*, the plaintiff cannot allege a *prior seisin* without traversing the *seisin* of the defendant.

REPLEVIN. The defendant avows taking the cattle damage-feasant in a certain parcel of land, parcel of the manor of S. and sheweth that Dame *Frances Jerningham* and *Henry Jerningham* were seised of the same manor in fee, and let the land in which, &c. to him for one-and-twenty years, and so avowed the taking, &c. The plaintiff, in bar to the avowry faith, that long time before the said *Frances* and *Henry* were seised of the same manor, king *Henry* the eighth was thereof seised in fee, and that this land was demised and demisable by copy of court roll, &c. and that king *Henry* the eighth did demise this land to the plaintiff by copy of court roll in fee ; which matter he was ready to aver, &c. And upon this it was demurred.—**GODFREY** alleged the cause of the demurrer, for that the plaintiff in his replication said, that king *Henry* the eighth was seised, &c. and demised to him, &c. and doth not traverse the *seisin* in fee in *Frances Jerningham* and *Henry Jerningham* : and it may be they came to the land by good title of *puisne temps*, as the land might be forfeited into the king's hands, &c. And in *Carew's case*, 5. Hen. 7. one pleaded in bar a feoffment of J. S. and gave colour to the plaintiff ; the plaintiff replieth, that long time before J. S. infeoffed the defendant, he infeoffed him ; so he was seised until disseised by the defendant. This is ruled no good plea, without a traverse or confession how J. S. came to the land afterward.—**COKE contra** : The replication is good enough ; for he hath by *nient dedire* confessed, that *Frances* and *Henry* were seised ; and he had a good title by the copy, before their title : and such a confession by *nient dedire* is good. 4. Edw. 2. Replication accordingly.—But the Justices said, that in the time of *Edward* the third the Judges had no great regard to pleading. **WRAY, C. J.** said, that since that book the law hath been taken otherwise ; and there is no question, but where the defendant doth allege *seisin* in one from whom he claimeth, the plaintiff cannot allege *seisin* in another from whom he claimeth, before the *seisin* of, &c. without traversing, confessing, or avoiding the *seisin* alleged by the defendant ; and judgment was commanded to be entered for the avowant.

1. Leon. 78.
Lut. 1343.

5. Com. Dig.
312.
5. Bac. Ab.
211.

Co. Lit. 303. a.
304.

Post. 278. 359.
384. 651. 754.

CASE 3.

Morton's Case.

Judgment recovered against another for the same injury, is a good plea in bar to trespass.

TRESPASS against *Morton* for entering into his house, and taking away his goods. The defendant pleadeth the trespass was done by him and J. S. and the plaintiff had brought trespass against J. S. and recovered against him, and had execution, and is satisfied, and demands judgment if he might impeach him, &c. And upon this it was demurred.—**FLOWDEN** moved, that this was a good plea ; for when a trespass is done by two, this is joint, and it is also several : so that if the party be satisfied by one, this is a discharge against the other ; and the trespass is so joint, that if the plaintiff

11. Co. 5.
Hob. 164.
Dyer, 34.
1. Term Rep.
690.

plaintiff doth confess that the defendant and another did the trespass, the writ shall abate; for it ought to be brought against both. 8. Hen. 5. pl. 9. 2. Hen. 7. pl. 16. *Foster's case*, 21. Edw. 4. 22. Edw. 4. In 2. Rich. 3. a difference is taken between a trespass by two, and a felony by two: for a felony by two, is always several; and a pardon of one, is no discharge of the other.

MORTON'S
CASE.

WRAY, C. J. conceived it reasonable, that the execution and satisfaction by one should discharge the other.—GAWDY *contra*: For the trespass is always in itself several; and when the plaintiff hath recovered against one, and is satisfied for the damages he has done to him, this is nothing to the trespass done by the other: but a release to one is available to the other; for by the release he acknowledges himself satisfied.—CLENCH. If one command three to do a trespass, and they do it, and a recovery is had against him, and he being in execution doth satisfy the plaintiff, this is a good discharge of the others; for the commander was the principal trespasser, and the others did it but as his servants; which GAWDY seemed to agree, *et adjournatur*.

Hob. 66.
Lit. Sect. 376.

Pinner's Case.

HE was indicted, that being coroner of *Ludlow* only, *cepit inquisitionem super visum corporis infra metas et hundredas comitat' Hereford*. And because it was not alledged where the inquisition was taken, nor by what persons, nor their names, nor that they were sworn, the inquisition was held to be void, and the party discharged.

CASE 4.
Coroner's inquisition must state the place, the jurors names, and that they were sworn.

2. Hawk. P. C. 77. Fitz. Cor. 107. S. P. C. 51.

Anonymous.

J. S. was indicted for entering upon a copyholder *with force*, against the 8. Hen. 6. c. 9. The force was removed, and he was restored to the possession by the justices of the peace; and afterwards this indictment was removed into the queen's bench by *certiorari*. The party traversed it, and it was found for him; but in the mean time a stranger recovered the land by a claim in nature of a writ of *droit clofe*, in the court of the lord of the manor, and was put in possession. The question was, If the party for whom the traverse of the indictment was found shall be restored to his possession, against him that had recovered in the lord's court? And it was adjudged, that he shall be restored, for otherwise he shall not have the effect of his suit; and this Court shall take no regard of the recovery in the lord's court, *de puisne temps*, of which they have no matter of record before them.

CASE 5.
Restoration of possession in forcible entry, shall be preferred to an intermediate possession, recovered in the lord's court.

Savil. 68. 141.
H. P. C. 140.
Noy, 119.
Yelv. 99.
Cro. Jac. 148.

Smith's Case.

CASE 6.

ACTION FOR WORDS. For that whereas *R. Smith* was attainted of felony, and shewed that the defendant said, "You," *innuendo the plaintiff*, "have done as ill, and worse; and it will cost you as much to be quit as it cost him."—GAWDY said, the action lieth not, for the words are uncertain; for it may be when he said, "you have done as ill, or worse," he intended he had done some great offence before God; and for uncertain words, an action lieth not. But the other Justices doubted, *et adjournatur*.—And in this term, RHODES, *serjeant*, moved if these words, "Thou art a knave, and a pillory knave," are actionable; and the Court conceived they were not (a).

Words of uncertain import are not actionable.

Cowp. 276.

(a) Sed vide, Brown v. Dauks, ante 11. contra.

CASE 7.

Wencomb's Case.

Conveyancing.

A. maketh a feoffment to *B.* of lands; and it was covenanted by indenture between them, that if *A.* doth pay to *B.* at the feast of *St. John Baptist* forty-seven pounds, that the feoffment shall be to the use of *A.* and his heirs; and if he faileth of payment, and *B.* doth not pay twenty pounds at *Michaelmas*, that then also the feoffment shall be to the use of *A.* and his heirs, and covenanted to make further assurance. Afterwards both *A.* and *B.* fail of payment at the days. And in *Hilary Term* next following both the feasts, a fine is levied to the feoffee, and no use expressed. All this was found by special verdict, and that the fine was only to the uses of the indenture. The question was, Whether the conusee of the fine, or the heirs of the feoffor, would have the land? And it was adjudged for the heir of the feoffor.

CASE 8.

Sir John Peter against Knoll.

Trespass may be hid at any day after it is committed.

3. Mod. 286.
Strange, 1095.
Ld. Ray. 240.
Salk. 639.
Cowp. 454. 828.

Heriot service may be seized for, or distrained. Post. 589.
Bro. Her. 6.
Co. Lit. 83. 162.
Cro. Car. 260.

TRESPASS, for taking an ox; May the first, and selling it, and converting the money to his own use. Upon not guilty pleaded, the jury found that the plaintiff seized the ox as a heriot-service, long time before the trespass; and afterward, and before the trespass supposed, the defendant as executor of *J. S.* (whose the ox was) took it, and sold it, &c. and as to that, it was found that the trespass was done before the day which the plaintiff supposed.—The Court held it not material, for being once a trespass, it is always a trespass.—To the other matter, *viz.* Whether the lord may seize a heriot-service? *Wray, C. J.* said he might, for this is a service which lieth not in *render*, but in *prender*; and the lord is to have the best beast, and it is at his election which he will take for the best; and it is inconvenient to put him to distrain, when he may seize; and said it hath been so adjudged.

CASE 9.

Harris' Case.

Indictment quashed for want of addition. Post. 148. Cro. Jac. 531.
2. Hawk. 328.

HE was indicted upon the 8. *Hen. 6. c. 9.* The indictment was removed by *certiorari*; and because the indictment was, that he made entry with force, and doth not alledge of what vill or county the party was, the indictment was abated; for process of outlawry lieth upon it.

CASE 10.

Hill's Case.

Pleading.

EJECTIONE FIRMÆ. And declared of a lease made to him by *J. S.* The defendant conveyeth to himself a title by lease, before that lease; and it was held no plea, for it mounts but to a general issue.

CASE 11.

Anonymous.

The return of "no such vill" to a *ven. fac.* must be accompanied by a panel from the body of the county.

Post. 201. 266.
6. Co. 14. b.

ERROR upon a judgment given against the father. The defendant alledged, that the plaintiff had an elder brother in full life at such a place, *viz.* in *M.* in the county of *Stafford.* Upon this they were at issue. The *venire facias* was of *vicinitas de M.* and the sheriff returned there was no such vill. The court held clearly it was no good return, for he ought to make the panel *de corpore comitatús.* 37. *Hen. 6. pl. 11. Accord. (a).*

(a) Now by 4. and 5. Ann. c. 16. in civil suits, and 24. Geo. 2. c. 18. in penal actions, every *venire facias* shall be awarded from the body of the county in which the action is triable. See *Mr. Harrow's note.* Co. Lit. 125. a.

Grave against Grave.

PER CURIAM, *absente* WRAY, *chief justice*. If an infant brings trespass by guardian, and afterwards he was nonsuit, he shall tender no costs.

1. Bac. Ab. 517. 1. Stra. 708.

Long's Case.

ANISI PRIUS was granted after issue, and afterward a *superse-
deas* was awarded; and, notwithstanding, the party proceeds with the *nisi prius*, the Justices not knowing of the *superse-
deas*, and the issue was tried for the defendant; and now this term the plain-
tiff prayeth a new *nisi prius*, and upon the same *venire facias* that the former was, for the trial upon the first was void, and *coram non
judice*, for the Justices had not power to proceed by reason of the *superse-
deas*. And a *nisi prius de novo* was granted; but the Justices said, that the plaintiff is to take good heed, that he hath none of the principal pannel which passed in the first trial, for it is a principal challenge that he was in the first trial.

Anonymous.

PERIAM, *Justice*, said, he had seen a precedent in the time of king Henry the eighth, that where a citizen of London sued another citizen in the common bench, and the mayor and aldermen of London would have him put the matter to compromise, which he refused; whereupon they did disfranchise him, and he shewed this matter to the Court; and thereupon they directed their writ to the mayor, &c. to restore him to his franchise, they assailed a fine of an hundred marks upon every of them that were parties to the disfranchisement, which they payed, as appeareth by the record, and the citizen was restored to his franchise.

Anonymous.

NOTA. The last day of this term a precedent was shewn to the Court, which was *Mich. 5. Hen. 5. roll 484*. An *audita querela* was brought in this court; and because the record was not brought into court, so as the party might have execution in the matter was found for him, for this cause the judgment was, that *querens nihil capiat per breve*.

Sym's Case.

NOTA. It was held by the Justices, that if two joint-tenants be of a term, and the one grants parcel of the term to a stranger, by this the jointure of all is severed.—Yet MANWOOD agreed, that if a man be possessed of a term in the right of his wife, and grants parcel of it to another, that, after the death of the *baron*, the *feme* shall have the residue of the term that was not granted, and it shall be only an alteration of what was granted.

Post. 279. Co. Lit. 46. b. Moor, 522. 1. Vern. 396. 3. Atk. 20.

Maldon's Case.

NOTA. If one saith to me, "You shall have a lease of my lands in D. for twenty-one years, paying therefor ten shillings *per annum*; make a lease in writing, and I will seal it." This was agreed to be a good lease by *parol*, although no writing be made of it, for the intent of the lessor is sufficiently expressed, and the making of it in writing is but for further assurance (a).

Ex relatione LEWIS.

(a) By 29. Car. 2. c. 3. leases of lands must be in writing, and signed by the parties or their agents duly authorized; other-

wife they will operate only as leases at will, except leases not exceeding three years.

Vol. I.

D

Michaelmas

CASE 12.

An infant shall not pay costs.

1. Com. Dig. 553.

Sayer's Costs, 93.

CASE 13.

A second *nisi prius* granted after judgment, with a caution not to impannel any of the former jury.

Cro. Jac. 43.

CASE 14.

A *mandamus* lies to restore a citizen of London disfranchised for suing a citizen.

11. Co. 98. a.

3. C. Dig. 409.

Burr. 517. 723.

Cowp. 378.

413. 523.

1. T. Rep. 423.

2. T. Rep. 177.

CASE 15.

In *audita querela* the record must be brought into court.

CASE 16.

A grant of parcel by one joint-tenant is a severance, but not if a husband grant part of a term he has in right of his wife.

CASE 17.

By what words a parole lease may be made.

Post. 486.

Moor, 8. 861.

Co. Lit. 1426.

2. Bl. Rep. 974.

1. T. Rep. 736.

3. B. A. 119. 421.

Cowp. 473.

2. T. Rep. 743.

Michaelmas Term,

26. and 27. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*Sir Thomas Gawdy, *Knt.*John Clench, *Esq.*Robert Schute, *Esq.*} *Justices.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

A proviso in a deed of settlement authorising the covenantor to limit any part of the settled estate for lives or years, will not enable him to make an unreasonable lease, in preference of one of his children.
 Post. 197.
 S. C. Moor, 144. 372.
 S. C. 1. Co. 175.
 S. C. Jenk. Cent. 247.
 Co. Ent. 30.
 1. Ch. Caf. 161.
 264. 246.
 3. Ch. Caf. 91.
 Powel on Powers, 210.
 Cowp. 595. 651.
 657. 714.
 2. Term Rep. 241. 380. 781.
 Dougl. 477.
 1. Brown Caf. Ch. 450.

Anthony Mildmay and Grace his Wife against Standish.
ACTION SUR LE CASE. The plaintiffs declared that they were seised of the manor of *Sacoke*, and had speech with *I. S.* concerning the making of a lease to him for twenty-one years, for which he was to give 100*l.* for a fine: that the defendant knowing of it, said to *I. S.* "That one *Jo. Talbot* and *Oliffe* his wife had a lease of it, not expired, for one thousand years;" and these words were spoken by the defendant, to the intent to take from the plaintiff the fine agreed upon; and that by reason of these words *I. S.* would not accept of the lease.—The defendant pleads in bar, that *Sir Henry Sherrington* was seised of the land in fee, and by indenture covenanted with, &c. *Vide* 1. Co. 175. and *Coke's Entries* 30. the whole pleading of the case (a).—It was argued *Pasc.* 26. *Eliz.* by FENNER and GAWDY, *serjeants*, for the plaintiff, and by WALMSLEY and PUCKERING, *serjeants*, for the defendants; and afterwards, *Trin.* 26. *Eliz.* GAWDY prayed judgment for the plaintiff.—ANDERSON, C. J. said, they were all agreed that judgment shall be given for the plaintiff; and shewed briefly that the cause of their judgment was, that this is an unreasonable lease, and not warranted by the proviso; and it was adjudged accordingly.—Afterwards *Mich.* 26. & 27. *Eliz.* a writ of error was brought in the queen's bench, and after argument by the counsel, WRAY, C. J. said, that they were agreed to affirm the judgment; and that the reasons that moved them were principally three.—First, By the indenture there are equality of estates in the land, and equal parts conveyed to the three daughters, with a proviso by his will in writing, to limit any part for payment of

(a) *Sir Henry Sherrington* was seised among other estates, of the manor in question in fee, and had issue three daughters: *Grace*, married to *Anthony Mildmay*; *Oliffe*, married to *John Talbot*; and *Ursula*, married to *Thomas Sadler*. *Sir Henry* covenanted *pro paterna amore et meliori mutatione* of his said daughters, to stand seised of his estates to the use of himself for life, the remainder to his three daughters severally in tail; the reversion to his own right heirs in fee; and if any of his said three daughters should die without issue, then her portion to be by moieties to the survivors: PROVIDED ALWAYS, "That it shall be lawful for the said *Sir Henry*, by his will in writing, to

"limit any part of the said lands, for any
 "life, lives, or years, for the payment of
 "his debts, performing of his legacies,
 "preference of his servants, or any other
 "reasonable considerations as to him shall
 "be thought good." *Ursula* died without issue, whereby her portion came to *Grace* and *Oliffe*. *Sir Henry* by his will, for the advancement of his daughter *Oliffe* and her husband, limited a great part of *Grace's* portion of his estates, including the manor, to *Oliffe* and her husband, in tail male, for 1000 years, without the reservation of any rent. And whether this limitation was good in law, by force of the proviso, was the question. Moor, 144. 1. Co. 175.

his debts and legacies, preferment of his servants, or other reasonable considerations as to him shall seem good; and this demise for a thousand years is not reasonable; for the intent of the indenture was the advancement of his blood, &c. and for the advancement of *Grace* and *Oliffe* his daughters. And this lease for one thousand years can be no advancement to the blood of *Sir Henry Sherrington*, for it shall go to the husband of *Oliffe* if he survive; and if he doth not, it shall go to the executor, &c. of *Oliffe* after her death, and by no possibility can this chattel go to the heirs or blood of *Sir H. Sherrington*, but shall go to strangers (b).—Secondly, *Grace*, the wife of the plaintiff, is to have a third part, by the first part of the indenture; and by this lease all her interest in effect is taken away, which is against the intent of the indenture; and the consideration was the preferment of *Grace*, that was married to the plaintiff, which was a great advancement to her, and for the preferment of the heirs males, and heirs generals, and by this lease it is wholly taken away; as if one giveth land in tail, provided he shall take the profits of parcel of the land for a thousand years, this is a void proviso, for by common presumption it taketh away the benefit and interest of the grantee in that parcel (c).—And Thirdly, This word “reasonable” is greatly to be considered, and shall be expounded strictly, especially in a proviso. For if by this proviso *Sir H. Sherrington* had given to a servant, being his yeoman, ten pounds *per annum* for life, this had been reasonable; yet if he had given him an hundred pounds *per annum*, it had been unreasonable: for in the first case, although ten pounds *per annum* be a great sum, yet it may be the servant was so faithful and honest as he might deserve it. Also every grant shall be expounded as the intent was at the time of the grant; as if I grant an annuity to *J. S.* until he be promoted to a competent benefice, and at the time of the grant he was but a mean person, and afterward is made an arch-deacon, yet if I offer him a competent benefice, according to his estate at the time of the grant, the annuity doth cease. And for these reasons and others known to them the judgment was affirmed.

MILDWAY
against
STANDISH.

(b) Moor, 145.
Cro. Car. 181.
2. Leon 138.
Owen, 40.
1. Lev. 30.

(c) Cro. Car.
400.
Cro. Jac. 175.
Hob. 159.
Moor, 372.
1. Bac. Ab. 412.
Fitzg. 299.
2. Vezey, 644.
Cowp. 266.
1. Co. 177. a.
Skinn. 531.
Shep. Touchst.
252.

Croker against Trevithin.

CASE 2.

THE case was, Lands were given in tail, upon condition if the donee or his heirs discontinue the land, the donor shall re-enter. The donee hath issue two daughters, and dieth. The daughters have issue two sons, and die. One of the sons discontinues the land to another; and it was held by the Court to be a breach of the condition.

On breach of condition by one of the heirs of the donee's issue, the donor shall re-enter.
Post. 163.

Litt. Sec. 362. 10. Co. 39. Co. Lit. 223. Moor, 39. Ventr. 322. 1. Leon. 292. Fearn's Con. Rem. 187.

The Aldermen of Chesterfield's Case.

CASE 3.

THE queen maketh a lease for years of land to the men of *Chesterfield*, rendering rent. The grant was to them by the name of the “Aldermen of *Chesterfield*,” and they by the name of “Aldermen of *Chesterfield*” grant all their interest to *Clarke* in the said land. It was agreed by the Court, that the grant by them was void; for they, by the grant of the queen, have capacity to take, but not to grant the land to another.

The grantee of the crown cannot grant over.
Post. 363.
Co. Lit. 3. a.
1. Roll. Ab.
513.

Hilary Term,

27. Eliz. In the Common Pleas.

Sir Edmund Anderson, *Knt.* Chief Justice.Hugh Wyndham, *Esq.*Thomas Meade, *Esq.*Sir William Periam, *Knt.*Sir John Popham, *Knt.* Attorney General.Sir Thomas Egerton, *Knt.* Solicitor General.

CASE I.

Thomas James *against* Landon.

Trinity Term, 24. Eliz. Roll 1232.

Estoppels shall endure no longer than the lease by which they are created.

- Co. Lit. 47.
- 4. Co. 54.
- Moor, 181. 96.
- 2. Leon. 159.
- 8. Co. 44.
- 1. R. Ab. 877.
- 3. Ba. Ab. 443.
- 1. Vent. 358.
- Carth. 247.
- Salk. 275.
- S. Touch. 274.
- Deuyl. 159.
- 2. T. Rep. 171.

SECOND DELIVERANCE. The parties were at issue, if it were the freehold of the plaintiff or of the defendant.—The jury found a special verdict, that J. S. was seised of the land and infeoffed *George James* in fee, who died seised, and the same descended to the plaintiff; and that afterward the defendant let the land to the plaintiff by indenture, for twenty-one years, and that the twenty-one years are expired, and prayed the discretion of the Court, &c.

The Justices shewed their opinion briefly.

PERIAM, *puisne Justice*. This estoppel shall endure no longer than the lease; for after the term is expired, the indenture is but an escrow, and a piece of parchment or paper (*quare de hoc*, for covenant or debt may be brought upon the indenture after the term expired, &c). And he said the difference hath always been between an estoppel by record and by indenture; for if one brings an action of waste against a tenant in fee-simple, and supposeth he held of him for years, &c. and the tenant pleads *nul waste fait*, this estoppel remaineth after the years expired.

WYNDHAM accorded, for it is not reasonable that by this negligence another should have his land for ever.

MEADE accordant, and said it was ruled in *Bright's case*, that the jury are not bound to find an estoppel.

ANDERSON, C. J. After the term expired the plaintiff may confess and avoid the lease.—And afterwards the plaintiff had judgment. *Vide* 4. Co. 54.

NOTA. *Mich. 9. & 10. Eliz. Pledal's case*, in B. R. The case was, A lease was made to father and son for eighty years, and afterward the father let the land to the son for fifty years by indenture, upon condition that if the father paid twenty pounds at such a day, &c. the lease should be void, as if it were never made. The condition was performed, the father enters, and deviseth the land to two others of his sons, and dieth: they enter upon the son

son who took the lease, and he re-ousteth them, and they bring an *ejectione firmæ*. This matter was given in evidence at *nisi prius* in the county, and the jury found against the plaintiff; upon which they brought an attain, and assigned the *faux serement* in this, that they found against them, whereas they ought to find for them. The opinion of the Justices was, that the son who took the lease was estopped to claim any other estate than for fifty years, and the estoppel continued after the fifty years expired; and thereupon the grand jury found for the plaintiffs, and they recovered their term and damages. *Ex relatione LEWIS.*

JAMES
against
LONDON.

Co. Lit. 227. a.
Post. 140.

NOTA. If one taketh a lease of his own land of an infant or *feme covert* by indenture, this is no estoppel; for in estoppels both parties are to be estopped, which the infant and *feme covert* are not.

Co. Lit. 352. a.
3. Bac. Ab. 442.
1. Wood Con.
335.

D 3

Easter

Easter Term,

2^d. Eliz. In the Common Pleas.Sir Edmund Anderson, *Knt. Chief Justice.*Hugh Wyndham, *Esq.*Thomas Meade, *Esq.*Sir William Periam, *Knt.*} *Justices.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*

CASE I.

Morris against Smith and Paget.

Trinity Term, 25. Eliz. Roll 731.

A manor cannot begin at this day; but if a lord, being seised in fee of the manor of *A.* which extends to *B.* and several other towns, and he grants all his manor of *B.* in the town of *B.* with all his *hereditaments* in *B.* the manor of *A.* is well divided, and the grantee may hold a court leet in *B.*

Ante, 19.

Post. 103. 150.

210. 299. 443.

322.

Co. Lit. 58. 324.

2. R. Ab. 122.

Owen. 4. 138.

1. Bull. 54.

Winch. 45.

Cro. Car. 308.

4. Co. 26. b.

5. Co. 11.

Plowd. 104.

Savil. 113.

2. Mod. 2.

Gillb. Ten. 210.

2. T. Rep. 415.

LINCOLN. IN REPLEVIN. A special verdict was given that Sir Francis Ascough was seised in fee of the manor of *Castor*, which did extend into the towns of *North-Kelsey*, *South-Kelsey*, *Holton*, and *Grisby*, and that in every of the said towns he had demesne land, and several freeholders which held of him, as of the said manor; and that MORRIS the plaintiff was seised of the lands in which, &c. and they did lie only in the town of *North-Kelsey*, and held them of the said Sir Francis, as of his manor of *North-Kelsey*, by fealty, &c. and suit at court *de tribus septimanis in tres septimanas* yearly: that Sir Francis being so seised, &c. by his deed indented and enrolled, &c. bargained and sold to Ralph Bard, esquire, in fee, "*totum illud suum manerium sive dominium de North-Kelsey in North-Kelsey, and all his lands, tenements, rents, reversions, services, wards, escheats, &c. et omnia alia sua regalitates, consuetudines, et hereditamenta quaecunque sita et existent in North-Kelsey,*" and that Jo. Morris being the tenant of the land in which, &c. Tho. Smith and others, freeholders in the said town of *North-Kelsey*, attorned to the said Ralph Bard; and if Ralph Bard had a manor in *North-Kelsey* to hold a court, they prayed the discretion of the Court.—NOTA. The distress was for not doing suit at court.—PERIAM, Justice, held that Bard had no manor in *North-Kelsey*, for Sir Francis Ascough had no such manor, but his manor was the manor of *Castor*. And if I have a manor in two counties, and have demesnes and services in both, and I grant my manor in one county, the grantee hath no manor, for I had no such manor; and in conveyances things must pass by their proper names, and a manor cannot be made at this day, neither by a common person nor by the queen. And he said a case was adjudged in the time of queen Mary to this purpose: The statute of 11. Edw. 3. c. 4. ordained that the king's eldest son shall be Duke of Cornwall: afterwards the king by his letters patents did annex the manor of *M.* in the county of *Wilts* to the said duchy. King Hen. 8. (there being then no prince) had the duchy in his own hand, and let the said manor of *M.* to J. S. for twenty-one years, and afterwards Prince Edward was born, and Duke of Cornwall by birth: it was adjudged the lease was good; for king Edward could not by

his letters patents make the manor parcel of the dutchy, for that must be by prescription. And if the queen granteth land to hold of the manor of *Greenwich* by certain services, these services are not parcel of the manor but by reputation; and a manor is a thing entire, which cannot be divided but by act in law, as between partners, 26. *Hen. 8. pl. 4.* But if two joint-tenants make partition at this day of a manor, and each of them hath demesne and services, yet each of them hath not a manor, nor can keep several courts, but must both keep one court. In the case at bar, there never was a court kept for the manor of *North-Kelsey*; and if I have a manor which doth extend into *A. B.* and *C.* and demesnes and services in all the towns, and I grant all the manor in *A.* the grantee hath a manor, but I have none in the other towns, but have the services in gross, 9. *Edw. 4.* But if the manor of *D.* extend into *A. B.* and *C.* and in each of them there be demesnes and services, and I grant all my manor in *B.* the feoffee hath no manor, but the manor remaineth with me.

WYNDHAM, *contra.* Though a manor cannot be made at this day, yet a manor may be divided; and although it was objected that the grant is "*totum suum manerium de North-Kelsey*," and so the sentence is false, for he had no such manor; yet he said the grant was good, for the word "*suum*" was superfluous: as if an executor hath power to sell the manor of *D.* and he sells it by the name of all his manor of *D.* yet the sale is good; so if *cestuy que use* before the statute had sold "*totum suum manerium de D.*" and here is no creation of a manor, but a dividing of it. And although a feignory or appendancy cannot be made at this day, yet if an advowson be appendant to a manor, and the lord grants part of the manor with the advowson to *J. S.* it is now appendant to that part, 43. *Edw. 3. pl. 12.* And the case of 9. *Edw. 4.* is, that by the grant or recovery of a manor in one town, the feoffee or recoverer of the manor in one town, hath a manor there, and the grantor, &c. hath a manor in the other; and the grant of the manor of *North-Kelsey* and of the manor in *North-Kelsey* is all of one effect; and a court baron is not tied to any particular place, but may be held sometimes in one place, and sometimes in another. As to the objection, that if I may make of one manor two manors, by the same reason I may make twenty. He said, So I may, and it is no mischief, and it is better for the tenants and suitors the nearer the court is to them.

ANDERSON, C. J. accords. He conceived the conveyance in substance was good enough, yet the form of it might have been better and more consonant to the law. If the grant had been "*totum manerium suum de Castor in North-Kelsey*," the manor had more aptly passed: here the grant is of the manor, and of all his hereditaments in *North-Kelsey*, and by this word "*hereditament*" the manor will pass. He agreed that a manor cannot be made at this day, and that the queen cannot make a thing parcel of a manor at this day; as if she grants lands to hold of her as of her manor of *Greenwich* by a certain rent, this rent is not parcel of the manor.—NOTA. *Mr. Bard* said his conveyance was made by *Wray* and *Manwood*, and that their opinion, and the opinion of *Carrell* of the Inner-Temple, was clear that the grant was good to convey a manor in *North-Kelsey*; and that *Carrell* held, that by force of this grant he might keep a court-leet in *North-Kelsey*, for there was a leet within the manor of *Castor*, and this might be well divided.

M. R. R. S.
against
SMITH
and
PAGET.

Co. Lit. 53.
1. Leon. 56.
1. Bl. Com. 97.

Trinity Term,

27. Eliz. In the Common Pleas.

Sir Edmund Anderfon, *Knt. Chief Justice.*

Hugh Wyndham, *Esq.*

Sir William Periam, *Knt.*

Francis Rhodes, *Esq.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

CASE I.

Lovelace against Lovelace.

A devise to one and his *eldest* issue-male passes an estate for life; to one and his issue-male, passes an estate tail.

Post. 478.

WASTE. The case was, *J. S.* being seised in fee of land, devised it to *J. D.* and to his *eldest* issue male (he having no son at that time). It was adjudged no estate tail, but for life only; and if he then had a son, it was all one: but a devise to one and his issue male, is an estate tail; but here the word *eldest* will not permit that construction.

Moor, 371. 2. Leon. 35. 1. Ander. 132. Co. Lit. 27. b. 7. Co. 41. b. Savil 75. Cal. temp. Hard. 160. Ld. Ray. 203. Sira. 731. 3. Com. Dig. 26. Powel on Dev. 359. 361. 1. Bur. 46. Dougl. 417.

CASE 2.

Edward Hyde against Morley.

Michaelmas Term, 26. and 27. Eliz. Roll 1602.

If a conusor of a statute merchant infeoffs, and before execution the conusor releases all his right to the feoffee, he cannot afterwards extend upon the feoffee.

Post. 552.

Cro. Jac. 449.

3. Co. 154.

2. R. Ab. 470.

1. And. 133.

1. R. Ab. 313.

Co. Lit. 265.

291.

10. Co. 47.

AUDITA QUERELA against the defendant for suing execution against the plaintiff, of the manor of *Wakeley* in the county of *Hertford*, upon a statute merchant of a thousand pounds, which one *Edward Halside* did acknowledge to him; and shews that the said *Halside* was at the time of the statute seised of the said manor, and afterwards sold it to the plaintiff; and the plaintiff being thereof seised, the defendant by his deed, &c. “*remisit et relaxavit*” (to the plaintiff) “*totum et quodlibet jus, titulum, interesse, et demanda quæcunque the said Morley habuit, habet, vel habere debuit, vel debet, de et in manerium prædictum, &c. necnon omnes et omnimodas actiones, sectas, executiones, et demanda quæ ipse, vel heredes, executores, &c. tunc habuere, vel habere possint, de aut versus præmissa, vel versus prædict. Ed. Hyde, &c. pro vel concernent’ aliquam materiam ratione præmissor.*” &c. And upon this it was demurred.

The case was argued by *FENNER* for the plaintiff, and *WALMSLEY* for the defendant; and it was adjudged that this release was a good bar of the execution upon the statute. *Vide Pasf. 39. B. R. plac. 2. contra adjudged.*

Clare

Clare against Pepys.

CASE 3.

WASTE. And declared that *P.* was seised in fee of the land, and made a feoffment to the use of himself for life, the remainder to the use of *A.* the mother of the plaintiff in fee; that *A.* died, and the remainder descended to the plaintiff; and for waste done after her death the action was brought.—The defendant pleaded that he was seised in fee *absque hoc*, that he made a feoffment, &c. The jury found that he made a feoffment, and that it was to the use of himself for life, without impeachment of waste, the remainder *ut supra*.
It was moved, that this verdict was for the defendant; and although it was not found that he was seised in fee, yet it being found that he held for life without impeachment of waste, it appeared to the Court that the plaintiff hath no cause of action. And of that opinion was *WYNDRHAM*; but the other Justices *contra*: for they said, the jury have found more than they needed, and compared it to the case of 12. *Hen. 8. pl. 1.* where the defendant hath matter of justification, and doth not plead it: and the plaintiff had judgment.

A verdict which finds matter that is not in issue, is bad.
1. R. Ab. 692.
3. Leon. 80.
Hob. 53.
Cro. Jac. 140.
Cowp. 826.
Dougl. 377-730.
1. Term Rep. 447-659.
Co. Lit. 282 a.
Post. 69. 79.
140. 283. 431.
481. 506. 634.

Fox's Case.

CASE 4.

NOTA. Justice *RHODES* said, that in that case it was adjudged, where a minister was deprived for an offence *tempore parliamenti*, and the offence was afterwards pardoned by parliament, and then the parliament ended, the deprivation was utterly void; for the pardon relateth to the first day, and the party need not sue to reverse the deprivation.

A statute pardon takes effect from the first day of the session.
Post. 789. 768.
778.

6. Co. 14. Latch. 22. Cro. Car. 67, 114. 2. Hawk. 358.

Anonymous.

CASE 5.

DEBT was brought against *J. S.* as executor, and pending this action *J. D.* brought debt against him as administrator for a true debt (whereas in truth he was executor). *J. S.* confessed the latter action, and pleads this recovery in bar of the first action. It was resolved to be no good plea: *First*, Because the recovery was had against him as administrator, and so is void, although this had been only a plea to the writ; and a stranger shall not falsify that which is only to the writ. *Secondly*, He that first sueth shall first be served, and the executor might have pleaded the first action against him that brought the second.

An executor cannot avail himself of a judgment which he has confessed in an action against him as administrator, pending the suit to which he pleads it.
Post. 471.
Dr. & St. 77. a.

Michaelmas

Clare

Michaelmas Term,

27. and 28. Eliz. In the Common Pleas.

Sir Edmund Anderson, *Knt.* Chief Justice.Hugh Wyndham, *Esq.*Sir William Periam, *Knt.*Francis Rhodes, *Esq.*

} Justices.

Sir John Popham, *Knt.* Attorney General.Sir Thomas Egerton, *Knt.* Solicitor General.

CASE 1.

Sidnam against Worthington.

Assumpsit will lie on a subsequent promise, for money paid as surety in consequence of a precedent request, although the consideration is executed.

Post. 59. 94.

194. 138. 282.

Yelv. 41.

Cro. Jac. 19.

Dyer, 272.

1. Ro. Ab. 11.

ASSUMPSIT. And declares, that whereas one *Hulledge* was sued in the queen's bench by *Cheeke*, and the plaintiff, at the instance of the defendant, became surety for him; that *Cheeke* recovered, and had execution against the plaintiff; the defendant afterwards promised the plaintiff, that if *Hulledge* did not pay the money which the plaintiff had paid to *Cheeke*, that the defendant would pay it (a); and avers that *Hulledge* did not pay it, nor the defendant upon request, &c.

Upon the first motion, *WYNDHAM* and *ANDERSON* held the action did not lie, because the promise was not made at the time of the request. *ANDERSON* said, that if I promise one that hath served me, I will give him ten pounds, it is *nudum pactum*.

PERIAM and *RHODES contra*. *RHODES* said, in the case put by *ANDERSON*, if I require one to serve me, and he doth so for one year, and after the year I promise him, in consideration he hath served me, to give him ten pounds, an action lieth. But if one agreeth to serve me for a year for twenty shillings for his wages, and after the year I pay him the twenty shillings, and in consideration of his service do promise to give him twenty shillings more, this is no consideration.

The principal case being moved again, at another day, all the Court held it a good consideration, by reason of the request precedent; and the plaintiff had judgment.

(a) By 29. Car. 2. c. 3. where a man undertakes to answer for the debt, default, or miscarriage of another, no verbal promise shall be sufficient to ground an action on, but some note or memorandum of it shall be made in writing, and signed by the party, unto whom he is charged with it.

CASE 2.

Green against Ardene.

The validity of a summons shall be tried by the court by witnesses.

9. Co. 30. b. Plowd. 2.

DECEIT for non summons in a *formedon* in remainder. The summoners and veyors were examined by the Court, as it was held they ought to be, and not by the clerks, whether they spoke the words or the bailiff, and at what time; and it appeared they did it after sun-set; and by all the Court the summons was not well made. But they said, that an arbitrement made in the night was good.

NOTA

NOTA. It was so adjudged between *Franklin and Davies*, *In-
stratur Mich.* 12. & 13. *Eliz. Rot.* 1330. in this court, where in
debt upon an obligation conditioned to stand to the award of
serjeant Lovelace and Manwood, so as the said award be made be-
fore the ninth day of October, &c. and it was made: the eighth day
of October, at ten of the clock in the night, and ruled good; for
dies naturalis comprehends the day and night. And *Pasch.* 26. *Eliz.*
in this court, between *Samms* and others, where the condition of
the obligation was to stand to the award of *Mr. Lewknor*, so as
the said award be made before the 21st day of July, &c. ready to
be delivered to the parties requiring the same; and he made the
award upon the 20th of July, at ten of the clock in the night: and
the making of the award in the night was ruled good; but the
doubt was, because the condition was "ready to be delivered to the
parties requiring the same;" and it was not a seasonable time to
require it in the night. And *FLEETWOOD* said in the principal
case, that it hath been adjudged, that a letter of attorney being to
deliver seisin, and he doth it in the night, that it was good.

GREEN
against
ARDENE.

Livery of seisin,
and an award
made in the
night are good.
Co. Lit. 135. a.
Post. 676.

Braet. 64. p. 264.
Britton, 209.
1. Saunders,
286.

Brightman against Keighley.

CASE 3.

DEBT against the defendant as executor to *J. S.* He pleaded
"fully administred," &c.

Upon a special verdict, it was found that *J. S.* made the defen-
dant his executor, being then within age; and thereupon the
ordinary committed administration to *A.* and *B.* who administred;
and that they had in their hands, when the defendant came to his
full age, of the goods of the testator, six hundred pounds; and the
defendant at his age proved the will, and then released to *A.* and *B.*
all actions. And it was adjudged it was assets.

ANDERSON, C. J. The doubt was, because it was uncertain
what he released, and for that only an account lieth: but here the
certainty appeareth by the verdict.

PERIAM said, If an executor doth release an account, and it is
not certain what he shall recover, it is not assets; but if it can
appear, or be proved that so much was due, it is assets. For the
law presumeth he hath received so much as he doth release; and
the plaintiff had judgment.

NOTA. RHODES, *Justice*, said, that in 17. *Eliz.* it was ruled,
that where one made his last will, and by it did will, that none
shall have any dealing with his goods until his son came to the
age of eighteen years except *J. S.* that by this *J. S.* was executor
during the minority of the son: and that it hath been adjudged,
that whereas one upon his death-bed said to his wife, that she
shall pay all and take all, by this she was executrix.

If an executor
release an ac-
count, so much
as appears due
thereon shall be
assets.

Post. 264. 671.
Hob. 66.
Godb. 29.
1. And. 138.
4. Leon. 102.
5. Co. 27. b.
1. Com. Dig.
400. 251. 254.
2. Bac. Ab. 418.
2. Vern. 299.
1. Wood's Con.
139.

What words
will constitute
an executor.
Post. 164.
Went. 12. 13.
19. 20.
Bro. Ex. 98.
Dyer, 4. in marg.
Moor, 12.

3. Leo. 3. 1. Roll. Abr. 829. 1. Leo. 229.

Lady Rich against Lord Rich.

CASE 4.

COVENANT. The case was, *Lord Rich* covenanted, that cer-
tain lands conveyed to the plaintiff for her jointure, are of
the value of one thousand pounds *per annum*, and so shall continue,
notwithstanding any act done, or to be done by him.

What shall be
considered a
breach of cove-
nant.

The

NOTA

RICH
against
RICH.

Post. 615. 762.
Cro. Car. 107.
496.

Cro. Jac. 644.
Shep. Touch. 166.

The action was brought, for that the lands were not of the yearly value of one thousand pounds: and it was adjudged against the plaintiff; for the words, "notwithstanding any act," extended as well to the time of the covenant made, as to the time future: and though they were not then of that value, the covenant was not broken, except some act done by him were the cause of it.

Lit. Rep. 80. 1. Wood's Con. 404, 405. 1. Ld. Ray. 365. 2. Ch. Rep. 10.
1. Term Rep. 671.

CASE 5.

Dale's Case.

In *deceit* for selling goods as his own, it must be averred that the defendant knew the fact to be false.

Cro. Jac. 474.
Show. 68.
1. Roll. Rep. 275.
1. Salk. 210.
Dougl. 158.
3. Term Rep. 51.

DECEIT. For that the defendant sold to the plaintiff certain goods as his own goods, *ubi revera* they were the goods of a stranger. It was alledged that the action did not lie, because it was not alledged that the defendant *sciens* that they were the goods of a stranger. And for that reason PERIAM and WYNDHAM held the action did not lie; but if it had been so alledged, the action did lie; for it may be, the defendant did know no other wise but that they were his own goods; but if he had affirmed they were his own goods, then the action would lie.

ANDERSON *contra*, for it shall be intended, that he that sold had knowledge whether they were his goods or not, 42. Aff. 8. And it was afterwards adjudged against the plaintiff.

CASE 6.

Reynolds' Case.

In what case an *audita querela* shall be allowed.
Post. 439.
3. Co. 52. b.

AUDITA QUERELA. For that he being in execution, was suffered to go at large, and was afterwards taken again; and the Court would not allow it: but then *Puckering* alledged, that the plaintiff had witnesses to prove that he paid the money when he was at large. And the witnesses being sworn, and the truth appearing to be so, the *audita querela* was allowed.

CASE 7.

Beverley against Cornewall.

After avoidance by plurality if a stranger presents, the king's prerogative dies with the incumbent.

Owen, 2. 5.
1. And. 148.
Moor, 224,
267. 241.
Gouldb. 44.
7. Co. 28. a.
Cro. Jac. 216.
4. Bac. Abr. 202.
2. Stra. 842.
Sav. 89.
1. Leon. 63.

QUARE IMPEDIT. Upon demurrer, the case was, *Simon Kelham* being parson of the rectory of *Somerley*, of the value of ten pounds, took the church of *Rappesly* without any dispensation, and was instituted and inducted, and so continued for twelve years. Afterwards, by reason of this plurality, *Beverley* presented *Berry*, who was instituted and inducted, and so continued for divers years, and died. The queen afterwards presented the defendant *ratione lapsus* in the time of *Kelham*, who was instituted and inducted. The plaintiff brought the *quare impedit* against the archbishop of *Canterbury*, and *Cornewall*. It was adjudged, that the *quare impedit* did lie; for in this case, *tempus occurrit reginae* (a); and judgment was given, that the defendant should be removed.

(a) See 9. Geo. 3. c. 16.

Nota

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Ch. Rep. 40

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NOTA. Afterwards Mich. 30. & 31. Eliz. which was entered, BEVERLEY
Trinity 30. Roll. 1306. another question arose between the same ^{against}
parties: Beverley, pending the *quare impedit*, was outlawed at the CORNEWELL.
suit of *Bawdes*: he being so outlawed, and judgment given for
him in the *quare impedit*, the defendant *Cornewall* resigned, and
took a new presentation from the queen, by reason of this out-
lawry in *Beverley*, and he was instituted and inducted. Afterward
Beverley reverseth the outlawry, and brings *scire facias* to have exe-
cution of the judgment. *Cornewall* pleads this presentation, by
reason of the outlawry, and demands judgment: for the presen-
tation was vested in the queen, and executed before the outlawry
was reversed; and by the reversal it shall not be divested: but
afterward it was adjudged that the plaintiff shall have execution;
for upon a recovery in a *quare impedit*, any incumbent that cometh
in *pendente placito*, shall be removed, 7. Co. 28.

Post. 119. 790.

Moor, 270. 1. And. 179. 7. Co. 28. Cro. Jac. 54. 216. 2. Bl. Com. 277. 4. Bac. Abr. 410.

Easter

Easter Term,

24. Eliz. In the Common Pleas.

Sir Edmund Anderson, *Knt. Chief Justice.*Hugh Wyndham, *Esq.*Sir William Periam, *Knt.*Francis Rhodes, *Esq.*} *Justices.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Dame Killigrew's Case.

Quere, Against whom the judgment in dower shall be given, where the tenant vouches the heir, who enters into warranty.
Post. 310.
Co. Lit. 32.

DOWER. The tenant vouched the heir, and prayed he might be summoned in the same county, and he was summoned and entered into the warranty, and confessed the dower.

It was moved, against whom the judgment should be. And the Court was in great doubt; for it did not appear that the heir had sufficient to render dower: for it would be in vain, and a great mischief to the demandant, if they give judgment for her, when peradventure the heir had nothing, or not sufficient to render dower; and they commanded precedents in this case to be searched.

CASE 2.

Anonymous.

Acceptance of satisfaction after a bond is forfeited, will not discharge the obligation.
Post. 304.
5. Co. 117. a.
6. Co. 44.
Bro. Dett. 174.
Cro. Jac. 254.
650.

DEBT upon an obligation to pay forty pounds at *Michaelmas* eve. The defendant pleaded a concord between the plaintiff and him; that if he gave him a hawk, and twenty pounds at *Michaelmas* day, the obligation should be void; and said, that he gave the hawk and twenty pounds at the day; and the plaintiff accepted it.

And this was held no plea; for it appeareth, that for not payment at the day the bond was forfeited, and so became single; which cannot be discharged by such a naked averment *in fait* of such an acceptance, although the agreement was before the day; but acceptance before the day was a good discharge.

CASE 3.

Anonymous.

The statute of uses immediately conveys the possession to the use. 2. Bl. Com. 332. 336. Dougl. 774.

NOTA. That *cessuy que use*, at this day, is immediately and actually seised and in possession of the land; so as he may have an assise or trespass before entry against any stranger who

enters

enters without title; and this by the words of the 27. Hen. 8. ANONYMOUS.
c. 10. viz. "that *cestuy que use* shall stand and be seised," &c.
And this was the opinion of divers Justices,

Playne's Case.

CASE 4.

A LESSEE for years was obliged to pay his rent. In debt upon it, he pleaded, that the lessor was bound in a statute; and upon that an *extendi facias* was awarded to seize the lands and tenements of the lessor into the queen's hands, which was executed accordingly; and upon that a *liberate* was awarded, and mean between the *extendi facias* returned; and the *liberate* awarded, the rent was incurred; for which he is chargeable to the queen, and demands judgment.

The opinion of the whole Court was clear to the contrary; for before the *liberate* awarded, *nihil operatur*, for he remains always tenant to the lessor, and chargeable to him for the rent: and the writ before is but of form, when it speaks of the seizing into the queen's hands; for it was never seen that lands were seized upon that writ.

Rent due from a lessee is not extinguished by the land's being extended by the queen, tho' it accrue between the *extendi* and the *liberate*.

2. Roll. Abr.

429.

Hob. 82.

Co. Lit. 148.

201.

10. Co. 128.

Cro. Car. 149.

Cowp. 242.

4. Burr. 2443.

Wadham v. Marlow, Cook's B. L. 346, cited 1. Term Rep. 91

Trinity

Trinity Term,

28. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt.* Chief Justice.

Sir Thomas Gawdy, *Knt.*

John Clinch, *Esq.*

Robert Schute, *Esq.*

Sir John Popham, *Knt.* Attorney General.

Sir Thomas Egerton, *Knt.* Solicitor General.

} Justices.

CASE 1.

Cropp against Hambleton.

Rent tendered off the premises by a third person, at any time before the condition is broken, saves the re-entry.

Ante 15.

Godb. 38.

Moor, 223.

5. Bac. Ab. 3.

TRESPASS. Upon special verdict, the case was, *Cropp* let to the defendant land for years, rendering rent at *Michaelmas*, with a re-entry for default of payment at *Michaelmas*, or twenty days after. The lessee for two years used to pay the rent to *Mary Briggs*, servant of the lessor, and he accepted it at her hands; and in the third year he paid the rent to the lessor, and in the fourth year paid it within the twenty days to the said *Mary Briggs*, and prayed her to pay it to the lessor; who within the twenty days tendered it to *Cropp*, who refused to receive it, and blamed her for taking it; and at the last day of the twenty days *Cropp* demanded the rent, and it was not paid: and thereupon he entered.

The question was, If his entry were lawful? And after argument, it was adjudged for the defendant, for the condition was not broken.

Plowd. 70. a. b.

10. Co. 129. a.

See Hargrave's

note [3] on

Co. Lit. 202. a.

Cowp. 243.

Dougl. 51.

2. Term Rep.

425.

THE COURT held, that the tender of the rent to the lessor himself at any day within the twenty days, although it be out of the land, is good, and he ought to receive it: and when he paid it to *Mary Briggs*, and she tendered it to the lessor, this she did as servant to the lessee for that time, and is as good as if the lessee had tendered it. *Ex relatione COVENTRY.*

CASE 2.

Burdet's Case.

If the steward of a manor make a deputy to take a surrender in fee, and he takes a conditional surrender, yet it is good.

Moor, 112.

1. Leon. 287.

Com. Rep. 84.

THE case was, The dean and chapter of *Ely* were seised of a manor, in which the custom was, that the copyholders may surrender out of court to the use of a stranger in fee: they make *J. S.* their steward *ad exequendum per se vel sufficientem deputatum suum.* *J. S.* maketh *A.* his deputy *hac vice*, to take a surrender of baron and feme to the use of the baron and feme for their lives, remainder over in fee; and the words were further in the deputation, "*et ulterius ad faciendum et exequendum quantum in me est.*"

The

The said *A.* by force of that deputation, takes a surrender from the *baron* and *feme*, upon condition, that the lord shall grant it to them for their lives, remainder over in fee. The surrender was executed accordingly; the *baron* and *feme* die; he in the remainder enters; the heir of the *feme* ousts him; and he brings trespass.

BURDET'S
CASE.

12. Mo. 468.
1. Bac. Ab.

479.
Gilb. Ten. 314.
Cowp. 26.

First, It was agreed, that this deputation *bâc vice* was good.

Secondly, That although the authority to take the surrender was absolute, and *A.* took the surrender upon condition, yet it was good, by reason of those words, *et ulterius ad faciendum, &c.*

Anonymous.

CASE 3.

ERROR. The error assigned was, that the defendant, in the original action of debt, was named "*nuper de London*," and in the exigent, "*de London*." And all THE COURT held it to be an error, for the original was the foundation of the suit, and the exigent is to pursue it without variance, and the word "*nuper*" being omitted out of the exigent, it is erroneous (*a*).

Variance.
Post. 50.

(a) By 5. Geo. 1. c. 13. all writs of error wherein there shall be any variance such writs are returnable.—But this shall from the original record, or other defect, not extend to writs of error, or criminal shall be amended, and made agreeable to proceedings.—See Dougl. 114.

Sir Thomas Cockaine and his Wife against Witnam.

CASE 4.

ACTION FOR WORDS. At the *nisi prius* the defendant pleaded, *concord puis le darraine continuance, judgment si al enquest, &c.* And by all the Justices it was no plea, but he ought to conclude, *judgment si actis, &c.* and so in all pleas pleaded since the last continuance.

CONCORD to an action for words pleaded *puis darraine continuance* must conclude to the action and not to the country;

and, if not true, confesses the matter in issue. Post. 747.

THEN it was moved, if judgment shall be given upon this, or a new *nisi prius* be granted; and upon good advice judgment was given for the plaintiff, for it was a confession of the matter in issue.

THE words were, "My Lady Cockaine did offer two shillings to a woman with child, to get her a drink to kill her child, because it was gotten by J. S. Sir Thomas Cockaine's butler." And it was moved the action did not lie for these words; but it was adjudged for the plaintiff, for by them the lady's credit is impaired; and if true, there was cause to bind her to her good behaviour, although it was not said she did give money, or any hurt was done, but that she offered, &c. This case was adjudged Hill. 19. Eliz. Intratur, Mich. 17. et 18. Eliz. Rot. 183. Ex relatione CHAMBERLAINE. Vide 4. Co. 16. b.

Words action-
able.
Dyer, 361.
Yelv. 181.
3. Lev. 120.
Freeman, 252.
112.
2. Mod. 307.
Allen, 66.
Bull. N. P. 309.
Gilb. C. P. 84.
Lutw. 3143.
2. Wll. 137.
3. Bl. Com. 317.

Michaelmas Term,

28. and 29. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*Sir Thomas Gawdy, *Knt.*John Clench, *Esq.*Robert Schute, *Esq.*} *Justices.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Crispe against Golding.

With what certainty the consideration in *assumpsit* must be alledged.

ASSUMPSIT. Upon issue joined that *non assumpsit*, it was found for the plaintiff.

WALMSLEY, *serjeant*, moved in arrest of judgment, that the consideration upon which the action was brought, was not well alledged; for the plaintiff declared that *J. S.* was seised in fee, and made a lease to him for years, 24. *Eliz.* by virtue whereof he entered and was possessed; and being so possessed, the defendant, upon communication between him and the plaintiff, assumed, that if the plaintiff would seal and deliver to him a deed of assignment of his lease and interest in the land, that he would pay to him a hundred pounds, and alledged that he did seal and deliver a deed of grant, &c. but doth not say he was then possessed; and if he were not, the grant was void; and so no consideration.

Ray. 9. 400.
Yelv. 17.
5. Com. Dig.
51.
Dougl. 727.

Secondly, he doth not alledge, that he did grant his lease and interest, but that he sealed and delivered a deed of grant, which is not a grant.

CURIA, *contra*; for when it was alledged that the plaintiff was once in possession, it shall be intended he did so continue till the grant, and it shall be intended a good grant, and the lease and interest passed by it: and it was so adjudged.

CASE 2.

Lancelot against Johns.

An outlawry in debt reversed for several errors.

Co. Lit. 283. b.
Ante 49.
Post. 104. 116.
240. 592.

ERROR, upon a recovery in debt, and outlawry upon it.

First Error. The defendant brought debt against Lancelot and *J. S.* and the sheriff returned, *quod non habent bona aut catalla* and *quod summoniri possint*; whereas it ought to be, *per quod summoniri, &c.*

Second Error. It ought to be, *neque eorum aliquis habet.*

Third Error. It is returned, *quinto exacti fuere per quod utlagati existunt*; whereas it ought to be, *per judicium coronatorum utlagati*, for they are judges, and the certificate is to be by them.

Fourth

Fourth Error. - In the original he was named *Launcelot*, and in the exigent *Lancelot*. LANCELOT
against
JOHNS.

Fifth Error. He was outlawed in *Hustingis*, and doth not say in *Hustingis de communibus placitis*. 1. Com. Dig.
46.

And for these errors the judgment was reversed. *Vide* 2. *Rich.* 3. *pl.* 13. 14. *Edw.* 4. *pl.* 6. 5. Com. Dig.
241.

Allen against Yorke.

CASE 3.

THE case was, *Allen* was condemned at the suit of *Yorke* in the queen's bench in an action upon the case, and damages were assessed to 4000*l.* *Yorke* dieth, being satisfied of 1000*l.* parcel of the 4000*l.* and his wife being executrix, brings a *scire facias* for the 3000*l.* residue.—THE COURT doubted. *Vide* 4. & 5. *Mar.* *Dyer*, 165. 19. *Rich.* 2. “Execution.” Quere, If an
executrix shall
recover by *scire*
facias the resi-
due of a judg-
ment debt due
to the testator.
1. Com. Dig.
241.

1. *Wilf.* 302. *Carth.* 69. *Strange*, 1198. See 17. *Car.* 2. c. 8.

Anonymous.

CASE 4.

ERROR, upon a judgment given in a *formedon*. The error assigned was, that the action was brought against three, whereof one was within age, and judgment was given by default; whereas judgment is not to be given against an infant by default; and upon this it was demurred in law. Quere, If judg-
ment in *forma-
don* shall be
given against an
infant by de-
fault.
Post. 309.
Cro. Jac. 465.

The infant was brought into court to be seen, and he was of the age of seven years.

THE COURT doubted after argument by *ANDREWS*, and would advise. *Vide Dyer*, 104.

Hillary Term,

29. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*

Sir Thomas Gawdy, *Knt.*

John Clench, *Esq.*

Robert Schute, *Esq.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

} *Justices.*

CASE 1.

Morgan against Kiffe.

"He maintain-
ed pirates."

Quest. If it
must not be a-
verred that he
knew them to
be pirates?

Post. 251. 487.

746.

Cro. Jac. 59.

ACTION FOR WORDS, that the plaintiff "maintained,"
"viſtualled, and helped to let go certain pirates, contrary
"to the law of the realm, and the proclamations made."
Upon not guilty pleaded it was found for the plaintiff, with
damages sixty pounds.

It was moved in arrest of judgment, that the words were not
actionable; for it is not alledged that he knew them to be pirates,
or maintained them in their piracy.

COKE, *contra*; for when it was alledged "he maintained
"pirates," &c. it shall be intended in *malam partem*, and that he
spoke them maliciously, and that he maintained them, knowing
them to be pirates. And it was adjudged in *Sir Henry Lea's* case
against *Penniston*, where *Penniston* said to *Sir Henry*, "he maintained
"thieves," that an action did lie; and afterwards the plaintiff had
judgment: for when it is said "he maintained them against the
"law and proclamations," it shall be intended in the worse sense.
And although piracy is triable by the civil law, yet by the
28. *Hen. 8. c. 15.* our law taketh notice of it.

CASE 2.

Pettywood against Cook.

Easter Term, 28. Eliz. Roll 374.

A. devises three
houses to his
wife, for life, with
remainder of one
house to each of
his three chil-
dren in fee; and
"if any of them
"die without
"issue, the sur-
"vivors shall
"enjoy totam
"illam partem
"equally between them."

EJECTIONE FIRMÆ. The case was, *Hawkins* was seised
in fee of three houses in *Bury*, and devised them to his wife
for life; the remainder of one of the messuages to *Robert* his son,
and his heirs; the remainder of one other of the messuages to
Christian his daughter, and her heirs; and of the third messuage
to *Joan* his daughter, and her heirs; having only these three
children. And did further will, that if any of them died without
issue, that then the survivors shall enjoy *totam illam partem* equal-
ly divided between them. *Christian* taketh husband, and hath
issue the lessor of the plaintiff, and dieth; after, *Robert* dieth with-
out issue.

—These words convey to the survivors an estate for life only. Post. 695. 749.

out issue; then *the feme* of the testator dieth. *Joan*, being the survivor, enters into all the part of *Robert*, and taketh husband, and hath issue the defendant, and dieth.

PETTYWOOD
against
COOKE.

The question was, If the issue of *Joan* shall have all the part of *Robert*, as a devise to his mother and her heirs; or if the issue of *Christian* shall have a moiety with her as co-partner?

2. Leon. 129.
193.
3. Leon. 180.
Shower, 207.
2. Mod. 253.
261. 383.
1. Roll. Abr. 836.
Eq. Ca. Abr. 185.
Stra. 805. 849.
Ld. Raym. 1561.
2. Vern. 388.
3. Com. Dig. 31.
2. Bac. Ab. 58.
3. Burr. 1896.
Cowp. 257.
1. Term Rep. 596.

The case was argued by GOLDING for the plaintiff, and COKE for the defendant; and all the Justices held, that by the devise only an estate for life is limited to the survivor, and the fee doth descend by course of law, as well to the issue of *Christian*, which first died, as to the survivor; and though the words are, "that the survivor shall enjoy *totam illam partem*," that is, all the messuage, and not according to all the estate the party dying had in the messuage; for no estate being limited, it shall be intended but an estate for life. And the plaintiff had judgment.

Dougl. 417. 759. 1. Term Rep. 596.

The Sheriffs of Norwich against Bradshaw.

CASE 3.

ACTION upon the case for an escape. The plaintiffs declared, that whereas *J. S.* recovered against the defendant in debt nine pounds and ten shillings, and a *capias* was awarded to take him in execution, by force whereof they made their warrant to the three serjeants, &c. there to arrest him, who did arrest him 25. Feb. and he escaped from them, and afterwards was not found in the said county, *per quod* they were bound by reason of the escape to answer the debt, *necnon* to expend money for the search of him, to their damages twenty pounds. Upon not guilty, the jury found he was arrested *circa* the 26. of Feb. and then and there *seipsum rescussit*. And it was alledged in arrest of judgment, that the declaration was not good, for two causes. 1. That they alledge that they made a certain warrant, and say not *sub sigillo sigillat*, and a warrant without seal is not sufficient. 2. They alledge that they were chargeable with the debt, but say not they were charged, nor shew not that they were otherwise damnified: and if they be not damnified they have no cause of action, for it may be the party will never sue them, or they may die before suit, and then the suit is gone: and an exception was taken to the verdict; for the arrest and rescue is supposed to be 26. Feb. and the jury find it was *circa* 26. Feb. which is uncertain whether it were before or after that day; and if it were after the day, it will not maintain the declaration, for then it cannot be a rescue the 26th day; but if it were before the day, then it continueth a rescue at that day.

The sheriff may bring an action for an escape against a prisoner before he has paid the money, and need not alledge in his declaration that the warrant was under seal, nor the precise day when the escape was made, so as it be before *his* suit was commenced.
Post. 237.
1. Strange, 434.
1. Lev. 237.
Lut. 64.
Godb. 125.
Shower, 174.
3. Co. 52.
1. Sid. 330.
Moor, 660. 404.
597.
1. Leon. 237.
1. Mod. 660.
3. Wilf. 269.

CURIA, contra in omnibus. As to the first, it is usual form, when the sheriff's warrant is pleaded to arrest one, to say that they made a warrant, &c. but do not say *sub sigillo*, &c. Secondly, An action lieth by the sheriffs upon this escape before the party sue them, for the party arrested did wrong to them by the escape and rescous, and they are always chargeable to the other party; and if they stay till they are sued, perhaps the party that escaped may die in the interim, or will fly the country, that they cannot hear of him; and in *Holt v. Hills* in this court, it hath been adjudged that an action lieth for this escape, and the party shall not take

Post. 124. 237.
264. 293. 349.
5. Co. 24. a.

SHERIFFS OF
NORWICH
against
BRADSHAW.

3. Co. 52. b.
F. N. Br. 130. b.

advantage of his own *tort*. And as to the exception to the verdict, it is good enough, be the rescous before the day or after the day supposed in the declaration, so as it be before the suit commenced.—And so CLENCH said it hath been adjudged upon great advice, where a trespass was found to be done after the day alledged, for the day is not material. And the plaintiff had judgment.

CASE 4.

Alford against Lee,

Hilary Term, 29. Eliz. Roll 556.

A release delivered to a stranger is a good performance of an award, if no particular place be mentioned for the delivery. Post 143. 627. 5. Co. 119. b. Moor, 3. 2. Leon. 110. Barnes, 54.

DEBT upon an obligation. The case upon demurrer was, The plaintiff and defendant submitted themselves to the award of certain persons, of all matters, &c. and were obliged each to the other to stand to the award. They made an award, that they should release each to the other all actions before the feast of *St. Peter* then next ensuing. The defendant in the eve of the said feast makes a release to the plaintiff, and delivers it to one *Primme* to the use of the plaintiff, without his assent or knowledge, and when the plaintiff heard of it, he disagreed to it; and if this were a performance of the award was the question.

COOPER argued it was not, for it taketh no effect as a release till the agreement of the party: and it is delivered to a stranger, who will peradventure not deliver it without suit, and perhaps will never deliver it; and relied upon 20. *Edw. 3. "Account,"* 70.

ATKINSON *contra*; for it is immediately a release, and he cannot plead against it, *non est factum*; nor can countermand it, and the plaintiff may agree to it when he pleaseth; and cited *Taw's case*, 2. *Eliz. Dyer*.

Afterwards, in *Trinity Term*, 29. *Eliz.* it was adjudged a good performance of the condition, because no place was appointed by the arbitrators where the release should be delivered; and it may be the plaintiff will absent himself out of the county, that the defendant cannot find him; and they relied upon *Taw's case*.

Easter

Easter Term,

29. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*Sir Thomas Gawdy, *Knt.*John Clench, *Esq.*Robert Schute, *Esq.*} *Justices.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*

Gray against Jefferies.

CASE 1.

TRESPASS upon the case. And supposeth that he in 24 Eliz. put *Th. Gray* his son and heir apparent to the defendant, to be his apprentice in the art of a taylor for seven years; and that the plaintiff was seised of lands in the county of *B.* in fee of the value of twenty pounds, which lands after his decease are to descend to the said *Th. Gray*: the defendant the first of May 28. Eliz. *vi & armis* did assault the said *Th.* and struck him with a spade upon his back, by which he became lame and decrepit, by reason whereof he lost his marriage, and could not marry him as before, to his damages two hundred pounds (*a*).

Upon this declaration the defendant did demur in law; and it was argued by *Tanfield* of the one part, and *Halton* of the other: and the same day without any further argument it was adjudged for the defendant; for the Justices said, it doth not appear by any book that the father should have an action for the loss of the marriage of his son and heir, except when a stranger takes him by force and marieth him: but if the son marry himself, or a stranger procureth him to marry one, the father hath no remedy: and trespass for beating or battery of the son lieth not for the father, but the son only shall have the action. Also in this case he is bound apprentice for seven years; and so till the seven years are past, the father hath nothing to do with him, and cannot marry him during that time; and so cannot have an action for loss of his marriage, which perhaps will never come to him.

(a) See 12. Car. 2. 24. by which the *valor maritagii* is abolished.

Anonymous.

CASE 2.

NOTA. It was held by WRAY and CLENCH, that if one cut trees which are or may be timber-trees, as oaks, elms, &c. although they be under the age of twenty years, no tithes are due; and so if trees of that age be cut, and new germins grow, no tithe is due, though they be cut under that age.

No tithes due for timber trees. Ante 1.

11. Co. 43. b.

CASE 3.

Love against Pigott.

A reversioner shall have prohibition, Moor, 915.
3. Lev. 209.

IT was said there are divers precedents, that if a lessee for years be sued in *Court-Christian* for tythes, he in the reversion may have a prohibition.

CASE 4.

Trevilian against Lane.

A lease for three lives made by tenant for life & remainder man in tail, is no discontinuance. Post. 152.

EJECTIONE FIRMÆ. The case was, *Avice Trevilian*, tenant for life, remainder in tail to *Thomas* her son, remainder in fee to the heirs of *Avice*. *Avice* and *Thomas* make a lease for three lives by indenture; *Avice* dieth; *Thomas* grants the reversion to *B.* in fee to the use of his last will; and afterwards deviseth the reversion for years and dieth. The three lessees for life die. The devisee for years enters; the heir of the body of *Thomas* ousts him; and he brings *ejectione firmæ*.

1. Co. 77. a. acc.

The question was, If the lease for three lives be a discontinuance to toll the entry of the issue?

Cowp. 702.

Drew argued that the entry of the issue was lawful; for the lease for three lives being made by deed, was the lease of the tenant for life, and the confirmation of *Thomas*, and so no discontinuance, 13. Hen. 7. 14. Comment. 140. 13. Edw. 4. 4. But if it had been without deed, then it had been the surrender of the tenant for life, and the lease of him in the remainder, for otherwise nothing would pass from him.

Coke contra, that it was a discontinuance; for a lease for three lives was more than they both could make; and so it is a *tort*, and the reversion was gained by *tort*, but in whom the reversion was, it may be doubted.

But it was adjudged that it was no discontinuance. *Ex relatione JOHANNIS WALTER.*

CASE 5.

East Skidmore and Foame against Vaudstevan.

A misnomer of the christian name of one of the plaintiffs in the defendant's plea of a release to an action of covenant, is fatal.

Ld. Raym. 28.

COVENANT. For not performing certain covenants in an indenture between the plaintiffs, master of the good ship of *A.* of which *Robert Pitman* was owner of the one part, and the defendant of the other part; and the conclusion of the indenture was, "*In cujus rei testimonium*, the parties aforesaid to these presents have set their hands and seals." And all the plaintiffs and the said *Robert Pitman* set their seals to one part, and the defendant to the other part; and in the indenture there were divers covenants to be performed by the plaintiffs and by the said *Robert Pitman* to the defendant; and *converso*: and there was a clause in the indenture, that the plaintiffs and the said *Robert Pitman* bound themselves to the defendant to perform the covenant. The defendant pleads, that the indenture was delivered to the plaintiffs, and to the said *Thomas Pitman* (and so mistakes *Thomas* for *Robert*); pleads the release of the said *Thomas* of all covenants; and thereupon the plaintiffs demurred, for two causes: 1. The release was pleaded by *Thomas Pitman*, whereas no such man was named in the indenture. And this was held a great mistake, and without defence; and the roll was commanded to be searched.

The

The chief matter was, admitting the name had been right pleaded, and that *Robert Pitman* had released, if this release was good. COKE argued, that forasmuch that only the plaintiffs in the premises of the indenture were parties of the one part, and the defendant of the other, although *Robert Pitman* is afterwards named in the deed, it is a void deed as to him; and no covenant made to him or by him is good, for he is a stranger to it, and his sealing and delivery is not material: as if *I. S.* by indenture between him of the one part, and *I. D.* of the other, demiseth lands to *I. D.* and *A. B.* it is void to *A. B.* And he answered the cases put by GODFREY of the other side, 4. *Edw. 2. Obligation*, where an obligation was made by *I. S.* & *ad majorem rei securitatem inveni J. D. Fide-Jussorem*, and *I. D.* put his seal to it; this was his deed: which case he agreed; for it is not mentioned whose deed it is; and so is the deed of both which are named, and put their seals, &c. So when an incumbent grants a rent, by the assent of patron and ordinary, and they put their seals to it, this is not their deed, but only their agreement to it; and the case of 39. *Edw. 3. pl. 9.* is upon the same reason of 4. *Edw. 2.*—In *Mich. 29. & 30. Eliz.* it was adjudged for the plaintiffs, and the principal cause was the *misnomer*, which the Court held could not be amended. WRAY said, they conceived the matter in law to be also for the plaintiffs.

EAST SKID-
MORE, &c.
against
VAUDSTEVAN.
A person whose
name is not
mentioned in
the premises of a
deed, is not a
party to it.
Post. 58. 115.
2. Inst. 673.
2. Rol. 22.
Cowp. 600.

Sir Walter Aston against Whitenall.

CASE 6.

WASTE. Error was brought of a judgment, in an action of waste, and the error assigned, that the plaintiff in the action did count, *quid cum fuisset seifitus* of the land, he did demise the same to the defendant for years, and he had done waste. The defendant pleaded "*nul waste fait*," and found against him, and judgment given. The error assigned was, that he saith "*quid seifitus, &c.*" but said not of what estate; and so may be intended but an estate for life.

Qu. If in waste
by lessor against
lessee, it is ne-
cessary for the
plaintiff ex-
pressly to plead
the estate of
which he is
seised.
Ante, 22.
Post. 65. 87.
9. Co. 27. a.

GODFREY and BEAUMONT said, that the declaration ought to comprehend certainty, and shall not be good by intendment: and although the declaration had been good, if he had not mentioned any seisin; yet when he alledges seisin, and that insufficiently, the declaration is not good; as *Partridge's Case* in *Plowden* reciting a statute, &c. (a).

(a) Plunket
v. Griffith
Post. 236.
Dougl. 642.
1. Term Rep.
236.

But SCHUTE and CLENCH, Justices, held the declaration to be good; for the allegation of seisin is not material, when it might have been left out; and it is helped by the words subsequent, *viz.* "*ad exhereditationem*," which explain how he was seised; and it being but matter of form, it is helped by the statute of *jeofails* after verdict.—GAWDY doubted; *et adjournatur*.

Disply against Sprat.

CASE 7.

EJECTIONE FIRMÆ. They were at issue, and in the *verdict* *facias* one of the pannel was named *Thomas Barker* of *D.* and in the *distringas jurat* he was left out, and *Thomas Carter* de *D.* put in his place. At the *nisi prius* *Thomas Carter* was sworn, and, with others, tried the issue.—COKE alledged this in arrest of judgment.

A man can
have but one
name of bap-
tism; but he
may have two
surnames.

DISPL
against
SPRAT.

Post. 319. 222.
258. 328. 866.
Cro. Jac. 558.
5. Co. 42. 43.
Co. Lit. 3. a.
3. Bac. Abr.
276. 622.

judgment; for now there were but eleven of the pannel, *Thomas Carter* being mistaken, and falsly named for *Thomas Baker*; as in a *venire facias*, a juror was returned by the name of *George Tompson*, and in the *disfringas jurat* he was named *Gregory Tompson*, and sworn at the *nisi prius*; and this was held a void verdict.—But THE COURT said, there is a great difference between a mistake in the name of baptism, and in the surname; for a man can have but one name of baptism, but may have two surnames.

CASE 2.

Windsmore against Hubbard.

Trinity Term, 27. Eliz. Roll 850.

A lease to one for life *habendum* to his three sons successively, but omitting to mention them in the premises of the deed, shall be for the life of the father only, and the sons shall not take in possession nor by way of remainder; nor can there be an occupant to such an estate.
Ante 56.

Post. 39. 121.
491.
Owen, 178.
Goldb. 51.
Co. Lit. 6.
9. Co. 47.
2. Roll. Abr. 65.
Hob. 275 313.
Hutt. 87.
Cart. 5.
Cro. Jac. 564.
33. Co. 54.
Poph. 126.
1. Wood Con.
17.
1. Salk. 188.

EJECTIONE FIRMÆ. The case was, *Lord Sturton* by indenture between him and *J. S.* let certain land to *J. S.* for life, *habendum* to him and *A. B.* and *C.* his three sons *successive*. The first question was, If they all took an estate, because the sons were not named in the premises of the deed? Secondly, the question was, If they take, whether they take jointly, or not? And thirdly, If they take no way, whether there shall be an occupant for the life of the three others, so as it shall be a lease to *J. S.* for his own life, and for the life of the three sons? And after argument by *Coke* and others, the clear opinion of the Court was, That the sons shall not take in possession, because they are *not named* in the premises of the deed, nor shall they take by way of remainder; for the intent was, to give the land to them in possession, 18. *Edw. 3. pl. 59. Brake "Leases" 54.* The only doubt was, if there shall be an occupant?—But *WRAY, C. J.* said, there can be no occupant; for it being limited to the father for his life, this is a greater estate than for the lives of others (*vide 5. Co. Rolfe's Case*) and the three sons are named as persons to have an estate, and not to make a limitation of an estate. And *Trin. 29.* it was adjudged, that there was no remainder, and that there shall be no occupant (a).
Ex relatione WALTER.

NOTA. *Delaper's Case*, 17. Eliz. (b). Tenant by the courtesy grants over his estate; the grantee deviseth it, and dieth: this was held a void devise, and out of the statute of wills: and it was held, that although the devisee doth first enter after the death of the devisor; yet he shall not have the land as an occupant, for there shall be no occupant of an estate of tenant by courtesy, or tenant in dower, which are estates created by law.
Ex relatione EDWARD COKE.

(a) By 29. Car. 2. c. 3. where there is no special occupant in whom the estate may vest, the tenant *per autre vie* may devise it by will, or it shall go to the executors, and be assets in their hands for payment of debts.—And by 14. Geo. 2. c. 20, it shall vest not only in the executors,

but in case the tenant dies intestate, in the administrators also, and go in a course of distribution like a chattel interest.—See 2. Bl. Com. 259, 260.

(b) Vide Harg. Co. Lit. 41. b. note [1] where this subject is explained. See also Powell on Devises, p. 37.

Trinity Term,

59

29. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*

Sir Thomas Gawdy, *Knt.*

John Clench, *Esq.*

Robert Schute, *Esq.*

} *Justices.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

Marth against Kavenford.

CASE 1.

ASSUMPSIT. And counts, that whereas, at the request of the defendant, there was a communication of a marriage between the plaintiff and the daughter of the defendant; that he married her, and that *afterwards* the defendant promised to pay him one hundred pounds.—EGERTON and FOSTER argued, that this was no consideration; for it is past, and had no reference to any act before: but if the marriage had been at the request of the defendant, and after the marriage he promised, &c. this had been good.—POPHAM, DANIEL, and COKE *contra*. For the father's natural affection doth continue, and her advancement is sufficient cause of the promise. And they said, it was adjudged in the exchequer, that a promise of ten pounds in consideration of counsel given to one, this was good, though the counsel was given before: and it was here adjudged for the plaintiff.

Promise by a father to his son-in-law *after the marriage* raises a consideration. Ante, 42. Post, 715. Cro. Car. 409. 1. Roll. Ab. 12. Hob. 105. Dyer, 272. 3. Lev. 366. 2. Leon. 211. Cowper, 294.

Raincroft against Lawney.

CASE 2.

Easter Term, 27. Eliz. Roll 167.

ERROR of a judgment in the common bench. For that the record was, that the defendant *obtulit se per* CUTTING, attorney, and left out his christian name: and the judgment was reversed.

Post, 75. 84. 145. 153. 177. 328. Sed vide Dougl. 114, 115.

Cottingham against Hulett.

CASE 3.

Easter Term, 29. Eliz. Roll 186.

ASSUMPSIT against an executor upon the promise of the testator; and in the declaration it was not averred that he had assets to pay debts, &c. But *Mich. 29. & 30. Eliz.* it was adjudged, that the declaration was good; and the plaintiff recovered.

9. Co. 90. b. Cro. Jac. 294. 1. Rol. Ab. 921. Cowp. 290. 295. 1. Term Rep. 235.

Ash against Wood.

CASE 4.

ERROR. The plaintiff counts in replevin *quod adhuc detinet*, and the jury assessed the value of the beasts and damages entirely; whereas they ought to sever them: for he may have the one, and not the other: and the judgment for this cause was reversed.

See 2. Bac. Abr. 8. Post, 560. Cro. Jac. 251.

Giles against Ferrers.

CASE 5.

THE Assise of Nufance. The plaintiff counts that *exaltavit domum*, the Jury find that *erexit*, and exception taken to it; but the Court was informed by the grammarians, that the words were of one sense.

Synonymous words. Post, 176. Cowp. 229. 725. 717. Dougl. 434.

Michaelmas Term,

29. and 30. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*Sir Thomas Gawdy, *Knt.*John Clench, *Esq.*Robert Schute, *Esq.*} *Justices.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Peeke against Wyrrall.

Pleading in
replevin.

REPLEVIN. The defendant made cognizance as bailiff of *Tho. Pigott, Esq.* for damage-fesant.—The plaintiff replied, that *Sir John Goodwin* was seised, &c. and that he and all his ancestors had used to have for him, and all his tenants for years and at will, &c. common in the place WHERE, for all their horses and colts; and he put in the horses, &c.—The defendant rejoined, that in the place WHERE, it was used time out of mind, &c. that if the horses of *Sir John*, or of his ancestors, &c. did come there by escape, and were not put in, that it should not be lawful for the said *Tho. Pigott, &c.* to distrain them damage-fesant, but to put them out peaceably; and said, that the place, &c. was inclosed, and that the plaintiff broke down the inclosure, and put in his cattle, for which he distrained, &c. ABSQUE HOC, that *Sir John Goodwin, &c.* had common in the place where, aliter, &c.—WALMSLEY moved this was no good traverse; for he did not confess that *Sir John Goodwin* had any common, and therefore he ought to traverse ABSQUE HOC, that *Sir John* had any common there.—CURIA. That pleading had been better; for in truth he hath not confessed any common, &c. but it seemeth good enough as it is; for this liberty that his cattle shall be there without being distrained, is in nature of common; and therefore he might plead as he did: but they ruled, that the defendant should mend his plea, or that a demurrer be joined.

CASE 2.

Knight against Mory.

A proviso that a lessee shall not alien his term without the lessor's consent, is a condition precedent; and devising it is a breach.

Post. 330, 337.
1. Roll. Abr.
428.

Cro. Jac. 74.
Dougl. 689.

REPLEVIN. The case was, *Shelley* makes a lease for years, proviso quod non licebit, to the lessee, to alien his term without the assent of the lessor. The lessee deviseth the term to his son; the lessor assenting to it.—Three points resolved. 1. This is a condition. 2. A devise in general is a breach of the condition.—3. As this case is it is no breach; for nothing passed till the lessor's assent was obtained; for it was a condition precedent: and though in the principal case the devisee did enter by the consent of the executor, and had not licence of the lessor, yet it is not material.

3. Leon. 67. 4. Leon. 5. Gouldf. 59. Dyer, 45. 4. Co. 119. Cowp. 803.
2. Term Rep. 425.

Anonymous

Anonymous.

CASE 3.

NOTA. COKE moved this case to the Justices, to know their opinion, he being (as he told me) to make his award in it.—Tenant in fee-simple soweth the land, and before the corn was severed, devised the land to *A.* for life, remainder to *B.* for life, and dieth. *A.* dieth before the emblements were severed; the question was, Whether the executor of the tenant for life, or he in the remainder, should have the emblements? for he said clearly, that the executor of the deviser had no colour to have them.

WRAY, C. J. and SCHUTE held, that he in the remainder should have them, for by the devise of the land they pass with it; and when they pass by reason of the land, and come not by the manurance of the first tenant for life, they shall go with the land: but if the first tenant for life here granted them to another, it had been otherwise; for by the grant they are *quasi* chattels severed from the land.—And WRAY, C. J. said, it hath been adjudged in this court, that where *baron* and *feme* are joyntentants of land, and the *baron* soweth the land, and dieth before severance of the corn, the *feme* shall have it.

CLENCH doubted in the principal case; for he conceived that the executor of the first tenant for life shall have them, as chattels vested in him: and he said, if land be sown, and then the land is devised to *J. S.* for life only, and before severance the devisee dieth, his executor shall have the corn, and not the reversioner: which case WRAY and SCHUTE denied; but said if it were so, it is not like the case a remainder.

POPHAM, *Attorney General*, being demanded his opinion, agreed with WRAY in the principal case, but doubted of the case of *baron* and *feme*.

Prat and Uxor against Taylor.

CASE 4.

ASSUMPSIT. That whereas the wife of the plaintiff, in consideration that the defendant should marry her daughter, had given to him ten pounds, he promised to the wife, that if he did not marry her daughter, he would repay the ten pounds; and avers he did not marry her, &c. Upon *non assumpsit* pleaded, and found for the plaintiffs, it was alledged in arrest of judgment, that the delivery of the money by the *feme* was void, and then the promise made to her is also void. And although the *baron* agreeth afterward to the delivery and promise (as it appeareth by his bringing the action), yet this cannot make the promise, which was void, to be good; for there was no consideration at the time of the promise. Another matter was moved, that the *baron* and *feme* did join in the action, where it ought to be brought by the *baron* only; for it is void to the *feme*, being during *coverture*, and it is as a promise made to the *baron* only. But it was adjudged, that the action was well brought; for the agreement of the *baron* maketh the promise good *ab initio* to the husband; and it being made to the wife, they may join in the action.

Anonymous

The remainder man for life shall have the emblements sown by the deviser in fee, in preference to the executor of the tenant for life.

Post. 464.

1. Roll. Ab.

727.

Winch. 51.

Hob. 132.

8. Aff. 21.

Dyer, 316.

Noy, 149.

2. Vern. 322.

Harg. C. L.

55. b.

Note (2.)

1. Com. Dig.

599.

Dougl. 283.

2. Bl. Com. 122.

A promise made to a wife is good *ab initio*, if the husband agree to it; and his bringing the action, (in which she may join) is evidence of his agreement.

Cro. Jac. 77.

205.

2. Sid. 128.

Stiles, 9.

Carth. 251.

4. Mod. 156.

Salk. 114.

Stra. 231.

Anonymous.

CASE 5.

Words taken
in *mitiori sensu*.

ACTION for these words, "Thou hast sitten upon the pil-
lory;" but saith not in what manner.—**HARRIS** moved,
that the words are not actionable; and so it was the opinion of
the Justices, who said he might well demur upon them.

CASE 6.

Donne's Case.

Words actiona-
ble.

Post. 384. 470.

Moor, 243.

Cowp. 276.

ACTION for these words, "If you had your deserts, you had
"been hanged before now."—**COKE** moved, that the action
did not lie, for that he did not shew any cause why he should
be hanged, and deserts might be in his mind concerning God.
—**CURIA contra**. For it shall be intended, he had committed an
offence, for which the penalty of death was due to him.—**WRAY**,
C. J. said, it hath been adjudged, that where one writ the name of
another upon a wall, and writ also, that "if this man had his de-
"serts, he should have been hanged on these gallows," and drew
a pair of gallows on the wall; it was adjudged, that an action
did lie for this.

CASE 7.

Gallies against Budbery.

A plea of *cove-*
nants perform-
ed, where
some are af-
firmative, and
some negative,
is bad.—Where
a term is plead-
ed, the com-
mencement of
it and the time
unexpired
ought to be
shewn.—Where
an act is to be
done upon re-
quest, the re-
quest must be
made within the
time limited.
Post. 232.
Co. Lit. 303. b.
Cowper, 578.

DEBT upon an obligation. The case upon demurrer was, The
plaintiff being possessed of a term for six years of a tavern in
Gracechurch-Street, let the same by indenture, with plate, and divers
utenfils in the house, to the defendant for three years. The de-
fendant, in consideration thereof, did covenant with him and his
assignees, that *de mense in mensem mensatim*, he would upon request
render to him and his assignees an account for every tun of wine
he did sell there, and pay him for every tun sold thirty shillings;
and there were divers other covenants on his part (some in the
affirmative, and some in the negative). He pleaded *covenants performed*
(which was ill in that). The plaintiff replieth, that upon the last
day of *July*, he required the defendant to give him an account of
a tun of wine sold at such a time, which he refused to do. The
defendant rejoined, that before that time, the plaintiff being pos-
sessed of a term in the tavern for divers years, part whereof were
yet to come (but doth not shew what time in certain, nor the
commencement of it; and therefore it was agreed by all, it was
ill in that), granted the residue of the said term then to come to *B*.
to which grant he attorned; after which time he did not refuse;
and upon this the plaintiff demurred.

DREW for the plaintiff argued, that notwithstanding the residue
of the term was granted over, yet the account was to be made to
the plaintiff, and not to the assignee, for it is a thing collateral;
and the assignee is to have only that which goeth with the house;
and assignee is, in deed and law, as an executor.

COKE contra. For this is as a rent reserved, and in nature and
lieu of the rent: but he said, that the request of an account
was to be within the month; and this request, as appeareth by
computation, was the day after the month; which being referred
to **KEMPE**, he certified the same accordingly; and for that cause
judgment was given against the plaintiff.

3. Co. 120. b.

Post. 284. 318.

Worcester

Worcester against Stone.

CASE 8.

Trinity Term, 27. Eliz. Roll 453.

THE case upon special verdict was, The plaintiff made a lease to the defendant for years rendering rent, upon condition, that if the rent were behind at the day, and ten days after (being in the mean while demanded), and no distress to be found upon the land, that the plaintiff might re-enter. The jury found, that the rent was behind at the day, and ten days after, and that a sufficient distress was upon the land till three of the clock in the afternoon of the tenth day; at which hour the lessee drove out his cattle; and at the last hour of the tenth day, the lessor came and demanded the rent, and it was not paid, nor any distress upon the land. The question was, If the condition was broken?—DANIEL for the plaintiff argued, that the condition was broken, for there was no distress at the time of the demand; and the words are, "if it be lawfully demanded and no distress found, &c." And it is not sufficient to have it at any time of the ten days, but at the proper time for the demand; which is the last instant of the tenth day: for otherwise, if there be a distress at any time within the ten days, though but for a quarter of an hour, it would dispense with the condition; and then the lessor must attend all the ten days, which would be inconvenient.—WRAY, C. J. and SCHUTE, J. The condition is not broken; for the intent of the words is, if no distress be found at any time within the ten days, then a re-entry; and therefore, if a distress be found there at any time within the ten days, this is sufficient.—CLENCH doubted. But it was afterwards adjudged against the plaintiff, because he made no demand in the mean time (a).

A condition of re-entry, if rent be in arrear for a certain space of time, after being demanded, and no distress on the premises, is not broken, if no demand be made within the time, though the goods are removed from the premises before the time for making the demand ultimately expires. Ante, 15. Dougl. 483. 486.

(a) See 4. Geo. 2. c. 28. s. 2.

Sir John Parrot's Case.

CASE 9.

COKE said, it was adjudged in that case, that a debt upon record by recovery, or otherwise, cannot be attached by the custom of the city of London.

A judgment debt cannot be attached. Post. 886.

1. Roll. Abr. 552. 1. Leon. 29. 3. Leon. 240. Dyer, 247. 1. Roll. Rep. 105. 1. Bac. Abr. 691. Dougl. 363.

Madox's Case.

CASE 10.

AN indictment against him was reversed, because the indictment was of a nuisance to a horseway, whereas it ought to be the queen's high-way, or the high-way.

Indictment quashed. Co. Lit. 56. a. 1. Hawk. P. C. 3. Bac. Abr. 60.

366. Ld. Ray. 1174. Salk. 359.

Robert Browne and Uxor against Garborough.

CASE 11.

ASSUMPSIT. And declareth of a promise made to the *feme dum sola fuit*; and alledgeth, that whereas a communication was between Jo. Browne, father of the plaintiff Robert, and the defendant, cousin of the said Robert Browne, and the said *feme*, when she was sole, of a marriage to be had between the said plaintiffs; and the said Jo. Browne promised to the *feme*, that if the marriage did take effect, that he would assure to them such land, &c. and that another did not assure certain lands to her upon that event.—Post. 619. Cro. Jac. 228. Cow. 742.

An assumpsit will lie on a promise to pay a woman a sum of money in consideration that she intermarry with the plaintiff.

And

BROWNE and
UXOR
against
GARBOROUGH.

And the defendant did then promise to her, that if *Jo. Browne* did not perform his promise, the defendant would give her one hundred pounds; and alledges, that the marriage did take effect, and the lands were not assured, &c. Upon *non assumpsit* it was found for the plaintiff.—*SHUTTLEWORTH, serjeant*, moved in arrest of judgment, that there was no sufficient consideration to ground the promise; for the *feme* was a meer stranger to the defendant; and there was no reason for him to give her one hundred pounds in marriage.—*GAWDY* and *SCHUTE* conceived it a good consideration; for it was alledged, that the defendant was kinsman to *Ro. Browne* the plaintiff; and it is to be intended, that by reason of these words she was induced to marry *R. Browne*, which otherwise she would not have done; and they commanded judgment to be entered for the plaintiffs: and upon a writ of error brought, the judgment in *Trin. 30. Eliz.* was affirmed; for peradventure she trusted the defendant rather than *Jo. Browne*, and the defendant was cousin to the said *R. Browne*, plaintiff.

CASE 12.

Yate, Brooke, Clement, and duo alii against Windnam.

A writ of partition between tenants in common, need not shew the titles of the plaintiffs; nor can a release to one of the defendants be pleaded in discharge of the others; and if they come in upon the *pone*, and not upon the first summons, the judgment shall be in *misericordia*.

Ante, 57.

Post. 155. 288.

Co. Lit. 168. a.

5. Co. 97. b.

5. Com. Dig. 37.

3. Bac. Abr. 212.

Cowp. 219.

ERROR upon a judgment given in a writ of partition against the now plaintiffs, at the suit of the now defendant.—Divers errors were assigned. The defendant pleads a release of all errors made to him by the said *Brooke* and *Clement*, who were summoned and seivered; and concluded upon it against them all; and demanded judgment *si actio*. Upon this it was demurred in law.—*TANFIELD* for the plaintiffs argued, that the judgment shall be reversed.—The first error was, that the said *Windnam*, plaintiff, in the writ of partition demanded partition, according to the *Hen. 8. c. 32.* and declared, that whereas he and the others held 400 acres of land in common, in six parts, to be divided, *viz.* the plaintiff *W.* two parts; the said *Brooke* one part; the said *Clement* one other part; and the other two, each of them a moiety of the other sixth part, &c. but shewed not their several titles to the said six parts; nor any manner of title, how the lands ought to be divided in that manner; and therefore the declaration is not good, for the writ and declaration ought always to comprehend their title; and therefore in a common writ of partition between coparceners, it comprehends the title, that it was the inheritance of their ancestor, and descended to them, *à fortiori* in this case where their parts are so unequal. And although in a writ of partition no land is demanded, yet it ought to comprehend their title, 36. *Hen. 6.* in a *quem redditum reddit*, which demands no rent or land, yet he ought to make a title; for he demands an attornment upon a grant of a rent, which is against common right. So 11. *Hen. 4.* in waste brought by two, supposing it to the disinheritance of one, they ought to shew how their title came to the land, in this manner to have an action, which is so against common right. So in every writ of waste, he ought to make title, *viz.* that he demised the land, or that he had the reversion *ex assignatione*; and he cited a judgment in a writ of error between *Hide and Union*, that in a writ of partition, the title must be comprehended in the writ of declaration, specially between jointenants, or tenants in common.—Second error was, that the defendants in the writ of

of error did come and confels the partitions, yet it was awarded that the defendants should be *in misericordiâ*, which is not to be in this action, where there is no *tort* objected against them, and when they confels the action.—3. Error, for that upon the judgment after the writ of partition was returned served, in all points, by the sheriff, the words of the judgment are, that *partitio prædicta inter partes prædict' stabilis et firma teneat*, whereas it should be *teneatur*. But upon the view of the record, it was *teneatur*.—4. As to the matter of the demurrer, if this release (admitting the judgment to be erroneous) doth bar them all of a writ of error: and he conceived it did not, for it is merely real, to which all the parties have interest; and though the judgment be intire, yet this release is no bar, but the judgment shall be intirely reversed; as 45. *Edw. 3. pl. 10.* two coparceners have title to a writ of ward of the body; one releaseth, this doth not bar the other, but he shall recover the entire for both: so 30. *Hen. 6.* in an assise by two, one releaseth, this doth not bar the other, it being a thing of inheritance; so in this case. But afterwards GAWDY, *serjeant*, who argued for the plaintiff, did agree that this release can be no bar to the other.—And *Hill. 30. Eliz.* the case was argued at large by GAWDY and COKE, that the declaration need not comprehend the title, for it shall be intended that they have the fee-simple, till the contrary doth appear; and by intendment he that bringeth the action cannot have consens of the title of the others, for every of them cometh in by a several title; and they shewed divers writs and declarations of partition, and one in *Michaelmas 26. & 27. Eliz.* in *Cheney v. Berry*, that in a writ of partition between tenants in common, title needed not be shewn. And of that opinion was the whole Court, and said they would not reverse the judgment contrary to so many precedents.—As to the second error, that the judgment was *idem in misericordiâ*, they said if the defendant came in upon the first summons, and such judgment be given, it is erroneous, but it was alledged they came in upon the *pone* (a), and then it is good. The Court moved the parties to agree, but afterwards the plaintiffs caused the writ to be discontinued (b).

YATE, & others
against
WINDHAM.

(a) 5. Co. 49.
Co. Lit. 126.
Cro. Car. 564.
8. Co. 61.
(b) See the
question re-
vived upon a
writ of diminu-
tion, Post. 155.
231.

See 8. and 9. Will. 3. c. 37. and 7. Ann. c. 18.

The Bishop of Gloucester's and Savacre's Case.

CASE 13.

ERROR upon a judgment given against them in a *quare impedit* brought by the queen, in which the bishop pleaded that he claimed nothing but as ordinary, &c. The question was, If the writ lieth in both their names, or ought to be brought only in the name of *Savacre*?—COKE argued, that the bishop ought not to join in the writ, for he had no loss, and relied upon the case 20. *Ass. 14. Attaint*, and 6. *Edw. 3. pl. 7.*—MALLORY and WINTER, *contra*, for the bishop is party to the record, and relied upon 3. *Edw. 3.* and 2. *Edw. 3.* and they said a writ of error in this case is but as a commission to examine errors, as 10. *Hen. 4. pl. 4.* is, and if more be named in a commission than needeth, it is not material.

In *quare impedit*, if judgment be against the bishop and incumbent, the bishop may join in a writ of error, though he claimed but as ordinary.
3. Leon. 176.
3. Mod. 134.
Cro. Jac. 94.
5. Mod. 69.
Carth. 376.

Stra. 606. 5. Mod. 16. 12. Mod. 1, 2. 130. 370. 3. Mod. 305. 316. Ld. Ray. 77. 1403.

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F

After-

GLOUCESTER
and
SAVACRE'S
CASE.

Afterward it was awarded that the writ was well brought; for WRAY said, the bishop hath loss, for by this judgment the writ shall be to the archbishop for admission and institution, and so he hath loss, and therefore may join.

CASE 14.

Bracebridge against Vaughan.

The marshal of the king's bench prison is within the 23. Hen. c. 6. 10. although not expressly named. 30. Co. 101. b.

DEBT upon an obligation. It was agreed by THE COURT, that where the marshal of the queen's bench taketh bond for the easement or delivery of a prisoner in execution, this is void by the 23. Hen. 6. c. 10. although he be not named in the statute: for WRAY said, divers persons are intended in the purview which are not mentioned in the statute. 1. Syd. 383. contra. Poph. 165. Dyer, 324. 1. Saund. 162.

CASE 15.

Hare against George.

Plea "an award" in bar to trespass must allege the place of submission and performance; and answer the *vi et armis*. Post. 78. 98. Lut. 1142. 1501. Salk. 4.

TRESPASS. The defendant pleads an arbitrement in bar, that the defendant should pay to the plaintiff twenty shillings, upon which the plaintiff demurs, because he doth not alledge a place where the submission was, 9. Hen. 6. pl. 5. and doth not alledge performance of the arbitrement, and doth not answer to the *vi et armis*; and for these causes it was adjudged for the plaintiff.

CASE 16.

John Fuller against Robert Spackman.

It need not be averred in pleading that an award was authorized by and within the terms of the submission.

Yelv. 78.
1. Saund. 102.
326.
Hob. 199.
Lutw. 528.

DEBT upon an obligation. The condition was to stand to the arbitrement of *Thomas Colehill* of all matters, suits, quarrels, actions, and debates whatsoever now depending between them, being at suit of law, or otherwise in controversy between them, so as the award be made before such a day, &c. in writing. The defendant pleads the arbitrement in writing made such a day in this manner, that the plaintiff shall enjoy quietly certain tythes in *D.* without interruption of the defendant, &c. and that he had suffered him to enjoy them, &c. which is all contained in the arbitrement, and demands judgment, &c. The plaintiff replieth, that besides that the said *T. Colehill* did by the said writing award that the defendant at a day, &c. should pay to the plaintiff five pounds in full satisfaction of all accounts, suits at law, arrears of tithes, and tithes unjustly taken at any time from the beginning of the world to the day of the obligation, &c. and alledges that the defendant did not pay the five pounds, and so assigned the breach, &c. Upon this it was demurred, and the cause was, because the plaintiff did not aver that there was any suit depending, &c. at the time of the submission; for if there was not, the award was void and out of the submission. But without any great argument it was adjudged by SCHUTE and GAWDY (being only present) for the plaintiff, and their reason was, that it shall be intended to be awarded for matters in suit, and an averment needs not, for otherwise every award may be avoided by such *nude* surmise.

Clecott

Clecott *against* Dennys.

CASE 17.

Easter Term, 39. Eliz. Roll 144.

ACTION upon the case. And alledged, that he had sued a *A deputy may be appointed without deed; but an assignee cannot.*
latitat against J. S. directed to the sheriff of *Devon*, intending to declare against him in debt, and J. S. was arrested, and in prison at his suit; the defendant pretending to be deputy to the sheriff, took bond of him, and let him at large, by which he had lost his suit, &c. The defendant pleads, that the sheriff made him his deputy to bail all prisoners bailable in the said county, and thereupon he took bond of J. S. and delivered it to the sheriff, and let him at large, &c. Upon this it was demurred, because he doth justify as deputy, and sheweth no deed of deputation, 28. H. 8. *Brook, Deputy*, 17.

10. Co. 98.
 3. Mod. 150.
 1. Leon. 119.
 Cases in L. & E.
 74.

WYATT argued that a deputation is good without deed, for a deputy doth things only as a servant, and in right of his master, and so may be made without deed; otherwise of an assignee, 11. *Edw. 4. pl. 1.* 12. *Edw. 3. "Monstrans de Faite,"* 65. And of that opinion was GAWDY. *Vide* 23. *Edw. 3. Barr.* 259. 8. *Rich. 2. "Avovery,"* 260.

Sir Anthony Sturlyn *against* Albany.

CASE 18.

ASSUMPSIT. The case was, The plaintiff had made a lease to J. S. of land for life rendering rent. J. S. grants all his estate to the defendant; the rent was behind for divers years; the plaintiff demands the rent of the defendant, who assumed that if the plaintiff could shew to him a deed that the rent was due, that he would pay to him the rent and the arrearages; the plaintiff alledged that upon such a day of, &c. at *Warwick*, he shewed unto him the indenture of lease, by which the rent was due, and notwithstanding he had not paid him the rent and the arrearages due for four years. Upon *non assumpsit* pleaded it was found for the plaintiff; and damages assessed to so much as the rent and arrearages did amount unto.—And it was moved in arrest of judgment, that there was no consideration to ground an action, for it is but the shewing of the deed, which is no consideration. — *promise by an obligor of a bond, in consideration that the obligee produces it.*
 2. The damages ought only to be assessed for the time the rent was behind, and not for the rent and the arrearages; for he hath other remedy for the rent; and a recovery in this action shall be no bar in another action. But it was adjudged for the plaintiff: for when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action; and here the shewing of the deed is a cause to avoid suit; and the rent and arrearages may be assessed all in damages: but they took order that the plaintiff should release to the defendant all the arrearages of rent before execution should be awarded.—**NOTA.** In this case it was alledged that it hath been adjudged, when one assumeth to another, that if he can shew him an obligation in which he was bound to him, that he would pay him, and he did shew the obligation, &c. that no action lieth upon this *assumpsit*; which was affirmed by the Justices.

If an under lessee promises the original lessor to pay him the rent and arrearages if he can shew him a deed by which it was due, and the lessor shews him the lease, it is a sufficient consideration to maintain an *assumpsit*; but no action lies on a *promise* by an obligor of a bond, in consideration that the obligee produces it.
 Post. 70. 75.
 150. 470. 644.
 Cro. Jac. 343.
 Cro. Car. 70.
 Cowp. 230.
 290.

Lord Mordant *against* Bridges.

CASE 19.

ACTION DE SCANDALIS MAGNATUM, for these words, Words actionable.
 "My lord Mordant did know that Prude robbed Shotbolt, Moor 686.
 "and

LD. MORDANT
against
BRIDGES.

" and bid me compound with *Shotbolt* for the same, and said he
" would see me satisfied for the same, though it cost him an
" hundred pounds; which I did for him, being my master, other-
" wise the evidence I could have given would have hanged
" *Prude*." (NOTA, in truth he spake those words before *Justice*
SCHUTE, in an evidence in conspiracy by *Prude v. Shotbolt*; but it
was not so alledged now.) Upon not guilty pleaded, it was found
for the plaintiff, damages a thousand pounds. And by *POPHAM*
and *EGERTON* it was alledged that the action did not lie; for
the words " he knew, &c. are not actionable: for a man that
knoweth another hath committed felony, is not bound to pursue
him. And as to the other words, " he commanded him to com-
" pound, &c." he might lawfully compound with the party
robbed to stop his appeal, and to the intent he might get his
pardon in the mean time. But it was adjudged for the plaintiff;
for the words shall be taken as spoken in the worse sense, and to
the disgrace of the said plaintiff, &c.—A writ of error was
brought in the exchequer chamber, and error assigned in the
point adjudged.

Post. 537.

CASE 20.

Bright against Hubbard.

Hillary Term, 27. Eliz. Roll 128.

A copyhold
surrendered to
the uses of the
will, on a devise
to a wife for
life, with liber-
ty to sell the re-
version for the
payment of
debts, is good.
3. Leon. 18.
Gibb. Ten. 275.

J. S. seised in fee of copy-hold land, devised it to his wife for
life, and that she should sell the reversion for payment of his
debts, and after in court did surrender the land to the use of his
wife for life, according to his will and deed. The question was, if
the wife could sell the reversion? And adjudged she might; for he
having made his will before, and devising it in such manner as
aforementioned, and after surrendering it, &c. and referring it to
his will; this is to be intended according to the intent there
limited and appointed; and she surrendering it upon condition to
pay twelve pounds, this was held a good sale according to
the will.

CASE 21.

Anonymous.

Money paid in
discharge of a
bond cannot be
applied to the
payment of a
book debt, at the
option of the
creditor.

Styles, 239.
2. Bro. 107.
5. Co. 117.

DEBT upon a bond. The case was, The defendant did owe to
the plaintiff certain money upon a bond, and certain money
for wares sold, as it appeared by his book. At the day of payment
upon the bond, he tendered the money according to the bond;
the plaintiff did accept it, and said it should be for the debt due
by his book, and not for the other debt; but the defendant said
he paid it upon his bond, and not otherwise; and the plaintiff
crossed his book, pretending the book-debt to be discharged, and
brought debt upon the bond. And it was adjudged against him;
for the payment is to be in that manner that the defendant would
pay it, and not according to the words of the plaintiff how he
would accept it.

CASE 22.

Frith's Case.

Judgment shall
not be reversed
because the de-
fendant has neg-
lected to plead
good matter in

DEBT upon two obligations, of which one was not then for-
feited, for the day of payment was not come. The defendant
pleads to that a release, and took no advantage of it, that it
appeared it was not forfeit: to the other he pleaded another
bar, or in abatement to the action. Post. 110. Cowp. 713. 1. Term Rep. 689.

plea

plea, and upon both they were at issue, and found for the plaintiff. FRITH'S CASE.
 And this matter was alledged in arrest of judgment, that it did appear upon the obligation shewn, that the day of payment was not yet come, and so the plaintiff is not to have judgment upon it. But it was adjudged for the plaintiff for both; because the defendant might have taken advantage of it, but did not; but waived it, and pleaded a collateral matter, which was found against him. Ant. 41. Post. 111.
 9. *Edw. 4.* the defendant pleads that the plaintiff had a co-executor who was in life, which had released to him; and upon this they were at issue; and found for the plaintiff, and awarded he shall recover, because the defendant might have abated the action being brought by the plaintiff alone, and had waived it. **BARTLET** of counsel with the plaintiff.

Forde against Rolls.

CASE 23.

ASSUMPSIT by the plaintiff as administrator of *J. S.* against the defendant, upon a promise made to the testator; after issue the plaintiff was non-suited.—**GOLDING**, for the defendant, prayed costs upon the *8. Eliz. c. 2.* which giveth costs against him that sueth maliciously; but if the suit had been upon a bond or record, or shop-book, and the money had been paid, yet no costs; for he had a ground and colour of suit.—**THE COURT** denied to give costs; for it cannot be said to be sued maliciously, being for another; neither can it be known but the plaintiff had colour to sue.

553. 1. Bac. Ab. 518. 2. Bac. Abr. 446.

Scavage against Freeman, &c.

CASE 24.

APPEAL by the plaintiff against *Freeman*, and four others as principals, and against *More* as accessory. The plaintiffs, after the parties who were appealed, had appeared, declared against all the principals together in *French*; and after, against the accessory in *French*. The four principals severally by himself made their defence in *French*, which was, "*Vous avez cesty I. Freeman, in proper person que defend' le tort & force & tous felonies & murders & ceo que est encounter le corone & dignity de nostre seigniore le Roigne & tout ceo que le defend' doit & demand oyer de breief & retourne de ceo,*" which was read; and then he pleaded in bar in *French*, "*que de ceo felony in ceo manner que il est appell il nest culpable & ceo il est prist de prover per son corps,*" and so waged battle; and in the same manner it was done by the three other principals, and the fifth principal and the accessory pleaded severally not guilty, and put himself upon the country (a).

(a) See 37. Ed. 3. c. 15. 4. Geo. 2. c. 26. and 6. Geo. 2. c. 6.

Cranmer's Case.

CASE 25.

NOTA. **WALMSLEY**, *serjeant*, said it was adjudged in that case, that whereas the queen had granted lands, reserving a fee-farm rent, with a condition of re-entry for non payment, and afterward the queen grants the fee-farm rent to *J. S.* in fee, and when the rent was behind, that the queen shall not re-enter; for that means she should defeat her own grant, which would be a tort to the grantee of the rent. The queen shall not re-enter so as to defeat her own grant. Cowp. 597.

CASE 26.

Foster against Scarlet.

A promise to convey lands in consideration of being released from debts is good; and if the conveyance is to be made by two, and it is stated that the request was made *sibi* it is good, for *sibi* is referable to both. Ante 4. 67. Post. 75. Cowp. 290.

ASSUMPSIT. The plaintiff declared, that whereas he and one *Willington* submitted themselves to the arbitrement of *A.* and *B.* of all matters, &c. the said *A.* and *B.* awarded that the plaintiff should release to the said *Willington* all debts which he owed him; and that *Willington* should assure to the plaintiff certain lands which he held for life, the reversion to the plaintiff; and that the defendant and one *Putter*, who pretended to have a lease in the said lands, should seal a deed to the plaintiff, that they should assure to the plaintiff their lease and interest in the said lands: and further alledged, that after the said arbitrement, in consideration that the plaintiff did assume to the said *Willington*, to stand to and perform the said arbitrement, the defendant did assume, that he and the said *Putter*, upon a request made *sibi*, would convey the said land to the plaintiff: and further alledged, that he had performed the said award on his part, and that he had requested the defendant, that he and *Putter* would convey the said land, &c. which they had not done. Upon *non assumpsit* it was found for the plaintiff, and it was alledged in arrest of judgment, that here is no consideration to bind the defendant, for he took no benefit thereby. But THE COURT held clearly the contrary, that it was a good consideration, for by reason of the promise the plaintiff was drawn to make the release; and it is not material that the defendant took no benefit by it.

SECONDLY, It was alledged, the defendant did assume that he and *Putter* upon request made *sibi* would convey, and no request is made to *Putter*, but only to the defendant; and it ought to be made to both, for *sibi* is the plural number, and so shall be intended, upon a request made to both. But COKE and GODFREY argued that the word *sibi* may be referred to the defendant only, for this word comprehends the singular number as well as the plural, and so may be referred to the defendant that is first named; and the request is to be made to him that did promise, which is the defendant; and relied upon 22. *Edw.* 3. pl. 4. But the Justices said that the word *sibi* is to be referred to both, for both are to do the act: and it was afterwards adjudged that the plaintiff *nihil capiat per billam.*

CASE 27.

Knight against German.

Trinity Term, 29. Eliz. Roll 669.

An action will not lie for indicting a man for felony unless it be done maliciously and without probable cause. Post. 134. 364. 2. Jones, 93. 1. Leon. 107. Palm. 315. Cro. Jac. 130. 357. 490. Latch. 79. Cro. Car. 15.

ERROR upon a judgment in an action upon the case. Two errors were assigned. First, for that in the said action the then plaintiff declared, that whereas he was of good name and fame, the now plaintiff intending to detract from his name and fame, and put his life in jeopardy, did maliciously cause a bill of indictment of felony to be written, and the same being so written, at such a sessions of the peace at *Newgate*, exhibited the same to the grand jury, *ET falso deposuit omnia in ea contenta fore vera;* whereupon he was indicted of the same felony, and after arraigned, was found not guilty, and thereupon brought the action, Upon not guilty pleaded, it was found for him; for which he had judgment to recover seventy-two pounds for damages and costs; *ubi*

verra upon this matter shewn, no action doth lie.—Secondly, that the exigent upon the judgment supposeth only seventy pounds was recovered, and not more.

KNIGHT
against
GERMAN.

As to the first matter the Court was in doubt; but WRAY, 1. Hawk. P. C. 347. 349. C. J. said, that this indictment being written and preferred maliciously, it is not reason but an action should lie to punish it; and 1. Term Rep. 493. 520 538. if two conspire maliciously to exhibit an indictment, and the party 2. Term Rep. 225. 231. be acquitted, he shall have a conspiracy; so when one doth it, this action upon the case lieth.—But SCHUTE and GAWDY *contra*, that the action doth not lie, for then every felon that is acquitted will sue an action against the party.

But for the second error, they held clearly it was well assigned, If judgment be recovered for one sum, and the exigent in suing to outlawry supposes it another, it is error. for there was no such judgment for seventy pounds; and though it was the default of the clerk, yet it cannot be amended to make the outlawry good. And it being moved at another day, the opinion of all the Court was, that the action lieth not when the indictment is preferred by the party grieved, and he pursueth it according to the law: and the statute of *Westm.* which doth give damages where the party is acquitted, doth prove this, and this case remaineth at common law. *Vide 27. Hen. 8. 27. Aff. 12. & 7. Hen. 6. pl. 14.*

Savel against Wood.

CASE 28.

PROHIBITION against a parson who sued for tithes in the spiritual court: and surmised that the clerk of the said parish, and all his predecessors, assistants to the minister there *divina celebranti*, had used to have five shillings of him, &c. for the tithes of the place where, &c.—COKE said this prescription is void, for it is in one person only that hath no perpetuity, but is dative and removeable, 32. *Hen. 6. pl. 5.* And if it be a good surmise, yet there is no cause but a consultation shall be awarded, for it is to come in question in the spiritual court, whether the parson or clerk hath right to the tithe? And he said it was lately adjudged in *Bush vs. Hunts*, where the vicar sued for tithes, and a prohibition prayed upon surmise, that he had used time out of mind to pay the tithes to the parson; that it was not a sufficient surmise for a prohibition to entitle another to the tithes, for that shall come in question in the court-christian.

On a suggestion in prohibition of a modus to pay so much a year to the parish-clerk in lieu of tithes to the rector, a consultation shall be granted. Post. 136. 251. 276 307. 317.

Moor, 908.
1. Leon. 94.
Cowp. 422.

NOTA. Afterwards, *Hill. 30. Eliz.* it was moved again by GAWDY and FLEETWOOD, *serjeants*, for the plaintiff, that it was a good prescription, because the parsonage was a parsonage improper, and by intendment it commenced by the act of the parson, viz. that he made a composition that the tithe of that land should be paid to the clerk in discharge of himself, and that he had used time out of mind, &c. to pay to the clerk five shillings in discharge of all tithes, &c.—THE COURT said, if this special matter be shewn in the surmise, perhaps it might be good by reason of the continuance, and that by this the parson is discharged from finding the clerk, with which peradventure he shall be charged, and so is as a payment of tithes to the parson himself; but such matter is not shewn, and by common intendment tithes are not to be paid to the parish-clerk, and he is no party in whom a prescription can be alledged; and thereupon they awarded a consultation.

CASE 29.

Topliffe against Wilfon.

Words action-
able.

ACTION for these words: "*Mr. Topliffe* hath forged and counterfeited a certificate to a commission out of the exchequer, and hath forged and counterfeited *Mr. Bircket's* and *Mr. Savell's* hands, the commissioners, and hath put their hands to it, by reason whereof he got a verdict in the exchequer, whereas otherwise he must needs have had the foil."—Upon not guilty, it was found for the plaintiff, damages ten pounds. And it was alledged in arrest of judgment, that the action doth not lie, because it was not shewn what commission it was, nor in what suit, so as the defendant might give answer to it; but judgment was given for the plaintiff.

CASE 30.

Ards against Simpson.

Warranty by
tenant for life
will not bind
the heir, a *feme*
revert, in re-
mainder; and
she may enter
alone, and bar
the fine.

Co. Lit. 366. a.
1. Wood's Con.
8.
2. Salk. 685.

EJECTIONE FIRMÆ. Upon special verdict, the case was, the father was tenant for life, the remainder to his daughter and heir apparent (being a *feme covert*) in fee. The father makes a feoffment to divers uses with warranty, and after levieth a fine with warranty and dieth. The daughter for herself, and in the name of her *baron*, and by his consent, enters within the year after the fine, claiming the land as her inheritance, and afterwards they let the land to the plaintiff. Two questions. *First*, If this entry by the *feme* only be good? *Secondly*, If this warranty, descending upon her during the coverture, shall bind her? And it was held by the Justices, that this entry by herself alone (the *baron* agreeing to it) is good.

Secondly, That the warranty descending upon her during the coverture, where her entry is congeable, doth not bind her.

And at another day, FULLER and GRAY moved, that although the warranty doth not bind the *feme* after the death of the *baron*, yet it shall bind the husband, for he might have entered before the descent of the warranty, which he not doing, is bound as a descent during the coverture. But it was adjudged for the plaintiff, for the warranty doth not descend upon the *baron*, but upon the *feme* only, and being void to bind her, shall not bind him (a).

(a) By 4. Ann. c. 16. s. 21. all warranties, by any tenants for life, descending to any person in remainder or reversion, are void; and all collateral warranties, where the ancestor had no estate of inheritance in possession, are void against the heir. Co. Lit. 373. b.

CASE 31.

Mary York against Allen.

If a pardon re-
lates back to a
day before the
exigent was
awarded, the
outlawry is
then by dis-
charged.

2. Bac. Abr.
578.
5. Co. 49. a. b.

SCIRE FACIAS upon a recognizance. The case was, One was *quarto exactus* in an action against him, and afterwards was *quinto exactus*, 23. Nov. 27. Eliz. and afterwards the pardon came, which had relation to all offences before the first of November. If by this the outlawry be discharged? was the question; for the outlawry was after the time unto which the pardon had relation. And *prima facie* the Justices held that it was discharged; but they would advise. *Vide* 36. Hen. 6. pl. 25. & 37. Hen. 6. *Quartermain's Case*. The next day it was moved again; and it was then adjudged that the outlawry was discharged and void, for the contempt and offence was pardoned, and then the outlawry after is void.

Scot.

Scot against Scot.

CASE 32.

THE case was, Recoverers to an use before the 27. Hen. 8. c. 10. make a lease for 99 years by indenture, rendering 10 l. *per annum*. The lessee by the same indenture covenanted with the recoverers that he will pay the rent to *cestui que use* his heirs and assigns; *PROVISO SEMPER*, that if the *cestui que use* doth not make his heir male his assignee, that then he shall pay the rent to the recoverers, their heirs and assigns. Afterwards *cestui que use* dieth, and doth not make his heir-male his assignee; the lessee doth not pay the rent to the recoverers. The question was, If his estate was forfeited, and that this *proviso* makes his estate conditional? —After argument, it was adjudged that it was no condition that went to the estate, but only abridged the covenant.

In what case a *proviso* does not make a condition, but only abridges the covenant. S. C. 2. Leon. 128.
3. Leon. 225.
Moor, 107.
Dyer, 222.
Poph. 119.
2. Co. 72.
1. Bac. Abr. 397.
1. Wood's Con. 370.

THEN was another question, If the rent be reserved at two feasts, *viz.* Michaelmas and Lady-day, and it is arrear at Lady-day, and not demanded at that day, if he may demand all at Michaelmas-day? And it was held he cannot, and a demand in that manner is void for all.

At what time rent must be demanded. Post. 242.
2. Co. 72. 2.

Allen against Andrews, of Gray's Inn.

CASE 33.

Trinity Term, 29. Eliz. Roll 1003.

DEBT upon an obligation of 300 l. which was conditioned to pay 14 l. yearly to the party, during the life of the wife of the defendant, at Michaelmas, or within one month after, at D. The defendant pleads, that two days before the end of the month he came to D. and there tendered the 14 l. and none was there to receive it; which matter, &c. and concluded not, that he was *tout temps priſt*; and upon this it was demurred in law, if this tender were good.

A tender at the place where money is appointed to be paid, two days before it becomes due, is void. Ante 14.

THE JUSTICES held, that if the tender had been to the plaintiff himself in person, within the month, if he had come thither, this peradventure had been good; but it seemeth hard to tender it when the plaintiff was absent; and to compel him to attend all the month was not reasonable: but by WRAY, it is more reasonable that the last day shall be for one to tender, and the other to receive; but they were in doubt of this case.

Co. Lit. 211.
Plowd. 172.
5. Co. 114.
12. Mod. 421.
Ld. Raym. 623.

BUT CLENCH said, if one be obliged to pay another 10 l. at Michaelmas, or within ten days after, and no place is limited for payment, then if the obligor meet the obligee within the ten days, and doth tender the 10 l. the obligation is saved; for perhaps at the last day he cannot find him. And the Justices held, in this case, the defendant need not plead *tout temps priſt*, for this sum cannot be intended parcel of the sum contained in the obligation; for peradventure more shall be paid during the life of the *feme*, than the sum in the obligation doth amount unto. But afterward it was adjudged for the plaintiff.

Morris against Kirke.

CASE 34.

ASSUMPSIT. And declares, that whereas he had expended divers sums of money for the defendant, amounting to 25 l. the defendant promised to pay him all the sums of money which he quest is issuable, and must be averred in the declaration. Q. See 2. Term Rep. 29. Post. 78. 85. 91. had

132. 177. 229.

MORRIS
against
KIRKE.

had expended for him, and alledgeth that *licet sapius requisitus*, the defendant had not paid, &c. Upon *non assumpsit*, it was found for the plaintiff. And it was now alledged in arrest of judgment, that the plaintiff ought to have alledged the day and place of the request, for it is issuable; and it is not like to a common action upon the case where a duty is due, for there it is payable without request, and it is in nature of an action of debt; but here an action is only maintainable upon the promise, and is not payable without an exprefs request, and shewing what is due. And so it was adjudged.

CASE 85.

Preston against Tooley.

Trinity Term, 29. Eliz. Roll 768.

Delivering a bond to and at the request of the defendant, to inspect and safely keep, is a sufficient consideration for his promise to pay a certain sum if he did not redeliver it to the plaintiff within a limited time.

Apte 67. 7e.

1. Saund. 33.

Cowp. 290.

ERROR upon a judgment in an *assumpsit*, brought in the common bench, *Pas.* 28. *Rot.* 927.—The case upon the record was, *Tooley* brought an *assumpsit* against *Preston*, and declared, that whereas *John Gibbons* by his writing obligatory, sealed with his seal, 26. *Eliz.* “*in formâ et naturâ scripti obligator’ sive recognitionis*” “*secundum formam statuti staple apud Westmonasterium, de debitis*” “*pro merchandisiis in eadem emptis recuperand’ ordinat’ et provis’ debitis*” “*modo confecti coram CHRISTOPHORO WRAY, capit’ justiciario, &c.*” “*recognovit et concessit se teneri in mille libris, &c. juxta formam dicti*” “*statuti, &c.*” And that afterwards upon 28. *March*, 27. *Eliz.* at *London*, at the request and instance of the defendant, he had delivered the said writing obligatory to him, *ad inspiciendum*, and safely to keep and redeliver to the plaintiff within six days after; and that the defendant, in consideration thereof, did then assume to him, that if he did not redeliver it within the said time, that he would pay him when required 1000 l. and alledgeth, that *licet* the defendant had not redelivered the said written obligatory within the said six days after the said delivery, and *licet* the said plaintiff after the said six days passed, *viz.* at such a day and place required the said *Preston* to pay the said 1000 l. according to his promise; he had not paid, and refused to pay, to his damages of 1000 l. The defendant did demur in law; and for cause shewed that there was no sufficient consideration to charge him. But after divers arguments it was adjudged a good consideration to charge him, and thereupon a writ of enquiry of damages was awarded; upon which it was found, that by the non performance of the promise, the plaintiff sustained damages 200 l. and for costs of suit, 53s. 4d. which were accordingly adjudged to him; and 17 l. 6s. and 8 d. more for costs.

The form in which a bond in the nature of a statute staple may be pleaded.

5. Com. Dig. 479.

In *assumpsit*, it is not necessary to alledge the time of delivery.

UPON all this matter a writ of error was brought. First error assigned was, that the said statute was merely void; for it is alledged to be a statute staple, according to the statute for the recovery of debts made at *Westminster*, &c. whereas it is a mere statute staple which is to be acknowledged before the mayor, &c. according to the 27. *Edw.* 3. c. 8. (a) and not before any other; and this is acknowledged before *WRAY*, C. J. *Sed non allocatur*, for it was held clearly to be well enough alledged, for it is a statute staple acknowledged according to the 23. *Hen.* 8. c. 6. and it is pleaded according to the usual course of pleading such statutes.

Second error, that there was no time certain alledged, when he delivered the statute to the defendant; but only it is alledged,

(a) See also, 11. *Edw.* 1. de *Acton Burnel*, and 13. *Edw.* 1. de *Mercatoribus*.

that at such a day he was possessed of the statute, and delivered it to the defendant at his instance and request. *Sed non allocatur*; but I did not hear their reason.

PRESTON
against
TOOLEY.

Third error out of the record, that the plaintiff *quarto die obtulit se* against the defendant *per attornatum suum*, but shewed not who was his attorney, and if he had no attorney it was error. *CURIA contra*, because it is not the course of the common bench, to enter the name of the attorney till after the declaration; and in the declaration it is said that he appeared *per* THO. WARREN, *attornatum suum*. But EGERTON shewed a precedent where the entry was, that one appeared by — CUTTING, *attornatum suum*, and shewed not his christian name; and this being alledged in error, the judgment was reversed, which the Court here did agree; for where he meddled with his name, he ought to name him truly by both names.

An appearance may be filed in C. B. without naming the attorney.
Ante 59.
Post. 153. 345.
Doug. 115.

Fourth error, which was not put in the record, that it was alledged, *licet* he had not delivered it within six days, &c. so he doth not precisely affirm it.—*CURIA contra*; for it is a good affirmation, as *Buckley's Case* in the Commentaries.

Fifth error, that the consideration was not sufficient, for it appeareth not that the defendant had any benefit by the shewing it to him, but rather charge and trouble to keep it, and to look on it. But as to this the Court would hear no arguments, for they held it clearly a good consideration; and this was the point disputed in the common bench, and therefore they commanded the judgment should be affirmed.

What is a sufficient affirmation.
2. Term Rep.
28. 45.

But EGERTON, *solicitor*, moved that the judgment might be stayed for another day; and then moved another error, that upon the writ to enquire of damages, the plaintiff had no day given him in court, and no day was given to the defendant then to appear, and vouched 8. *Hen. 7. Roll 29. Bk. of Ent. 273.* where the error was assigned, and admitted good; and this he said was a manifest error, and the Court said they would advise of it; but afterward the next day it was moved again, and this error overruled; for they said the course of the common bench was to give no day. But all the precedents in this court are otherwise, and the death of the party plaintiff abateth the writ (a). And the judgment was affirmed.

A writ of enquiry held good, though no day was given to the parties.
Post. 144.
Yelv. 97.
11. Co. 6. b.

(a) *Sed vide* 8. & 9. Will. 3. c. 10.

The Mayor of Lawnson's Cafe.

CASE 36.

TRESPASS against him for taking a quarter of corn. He justified for that it was within the town of *Lawnson*, and it was damage feasant in his freehold. The plaintiff replies, that they were by *charter* in the time of queen *Mary* incorporate, &c. and a market was granted to them, and the place where, &c. was appointed for the market-place, and he brought his corn on the market-day, and set it there, and the defendant took it: and upon demurrer, it was adjudged without argument, that upon this matter the mayor could not justify the taking.

A mayor cannot justify taking corn damage feasant from the market-place.
Post. 117. 623.
10. Co. 94.
2. Ld. Raym. 1590.
Cowp. 661.
1. Term Rep. 660.
2. Stra. 1238.

Dinham

CASE 37.

Dinham against Beckett.

Quæst. Whether a defendant who justifies a trespass by special title must give colour to the plaintiff?
10. Co. 89. b.
90. a.

TRESPASS for breaking his close. Defendant pleads that J. S. was seised of the land and let it to J. D. and he as his servant entered, and gave no colour to the plaintiff; and for that cause the plaintiff demurred. And it was argued by GRIFFITH of the one part, and by SHIRLEY on the other part.

GRIFFITH said, that when the defendant doth make a special title to himself or to any other, he ought of necessity to give colour to the plaintiff; but when he pleads a general plea, or that it is his freehold, it is otherwise. 2. Edw. 4. pl. 8.

SHIRLEY *contra*, because the defendant doth make no title to himself, but doth justify as a servant. 18. Edw. 4. pl. 3.

WRAY, C. J. said he ought to give colour, though he justified as a servant, but moved the parties to relinquish their demurrer, and plead to issue, which they did.

CASE 38.

Gabriel Widow against Peter Clerke.

A mayor, who is both judge and sheriff, is bound to take sufficient bail; but a *qui tam* action for refusing it, must be by information or original writ, and not by bill.
Post. 544.

5. Inst. 194.
1. Roll. Ab. 537.
Moer, 247.
Cro. Car. 138.
3. Leon. 237.
Wm Jones, 193.
3. Burr. 1615.
Strange, 479.
2. Hawk. 148.
380, 381.
Dy. r. 332.
1. Sid. 305. sed vide Douglas;
382. n. 22. and Milward v. Thatcher,
2. Term Rep. 51.
2. Morgan's Vade Mecum, 191.

BILL OF DEBT for 40l. upon the 23. Hen. 6. c. 9. brought by the plaintiff, *tam pro se, quam pro dominâ reginâ*. And declared, that whereas Anthony Wolley, 27. Eliz. had sued in the court of Nottingham, before the said defendant, then mayor, and J. S. and J. D. sheriffs there, according to the custom of the said town, a plaint of trespass *sur case* against Anthony the plaintiff, upon which a *capias* was awarded by them to O. B. serjeant and officer of the said court, to take the said plaintiff, and have his body before them at the next court, viz. 1. Septembris, to answer, &c. and that afterward, viz. 23. August, 27. Eliz. the said O. B. arrested him, and that he committed him to the prison of Nottingham, under the custody of the said Peter Clerke, mayor of the said town, and keeper of the queen's gaol there; and alledged further, that he being then in prison, 28. August, 27. Eliz. did offer to the said mayor, keeper of the said gaol, sureties, &c. to appear at the next court, to answer to the said Anthony Wolley in the said action, which sureties he then refused, and kept him in prison until, &c. against the form of the said statute, *per quod actio accrevit*.

The defendant pleads *nihil debet*, and found against him; and this term it was moved in arrest of judgment, that the action lieth not against the mayor, for the sureties were not to be offered unto him but to the serjeant; for the mayor was the judge to award the process, and cannot be an officer to himself to take the bail. Also the warrant is, that he shall take his body and keep him till the next court, viz. 1. Septemb. and so till that day is come he is in the custody of the serjeant, in whatsoever prison he is committed. Also the surety offered is not according to the statute, for it is that he shall appear *ad respondendum*, whereas it is to be only for his appearance, and not for his answer.

Sed non allocantur, for it was held clearly that the plaintiff is to recover, for the serjeant is but the inferior officer; and although the mayor is judge in some respects, yet he may be an officer for keeping the gaol; and here he is not only the judge, but the sheriff also, and the plaintiff being in prison under him, it is proper

Post. 168.
Cro. Car. 138.
196.
Cro. Jac. 94.
10. Co. 101. b.

proper to offer sureties to him; and so is the common course in London, upon plaint before the sheriffs, and a precept to the serjeant to arrest one, the sureties shall be found and offered to the sheriffs. 9. Hen. 6. pl. 19. And when the party is brought to the gaol he is under the mayor's custody, and not of the serjeants (a). And they held clearly that the surety offered was according to the statute, and commanded judgment to be entered accordingly, but it was stayed till the next day.

Widow
against
Clerke.

(a) See 1. Bac.
Abr. 203. in
notis.

WALMSLEY, *serjeant*, then said, that the action is not well brought; for the 18. Eliz. c. 5. is, that no action shall be brought but by information or original action, and not otherwise, and this is by bill of debt.

COKE.—This action, in this court, is the proper original action that is sued in this court, and so is within the intent of the 2. Rich. 3. c. 17. & 27. Hen. 6. c. 5. Also the 18. Eliz. c. 5. is to redress disorders in common informers, but here he that sueth is the party grieved. But the Court held it will be hard to maintain this action to be sued here, for the statute is in the negative, that it shall not be sued otherwise, which doth not refer to any person; but they would advise.

Post. 544.
1. Roll. Ab. 357.
3. Inst. 194.
Moor, 412.
6. Co. 19. b.
1. Com. Dig.
319.

DANIEL said he was of counsel with the gaoler of *Bosfin* in a bill brought against him in this court, and it was abated for this cause, that it was not by information.

Afterward, *Ter. Pasch.* it was for this cause only adjudged for the defendant; and it cannot be helped by the 18. Eliz. c. 14. for *jeofaile*, for this is not matter of form but substance, by misconceiving the action.

Hector Nunns, Doctor of Physic, against Gee.

CASE 39.

Easter Term, 29. Eliz. Roll 498.

COVENANT. And declareth, that whereas the queen by her letters patent granted licence to him, his deputies and assigns, to buy *Spanish* wool, and to transport it hither, &c. he by this indenture bearing date, &c. granted to the defendant, and to Roger Norwood, the said licence for eight years, with divers covenants to enjoy it; in consideration whereof the said defendant did covenant and grant to him, to pay to him 100l. every year at two feasts, viz. the *Annunciation* and *Michaelmas*; and further, that every year at the feast of the *Annunciation*, or within twenty days after, he would make a new obligation of 150l. for the payment of the said 100l. the next year; and alledges in fact that the defendant had not paid him the 50l. due to him at *Michaelmas* 28. Eliz. and that he did not make an obligation at the *Annunciation*, &c. and for those covenants broken he brought the action.

1. Wood's Cop.
396.
Cowp. 819.
1. Term Rep.
229.

The defendant pleaded, that in the indenture there is contained, "PROVISO SEMPER, that if the defendant doth not every year make the obligation at the feast of the *Annunciation*, or failed payment of the money at the day, that then and from thenceforth the said indenture, and every clause, article, and sentence therein should be void, and of none effect;" and shewed that he failed in making the obligation at the first day, and so the indenture is void, and demands judgment, *si actio*. Upon this it was demurred in law.

OWEN

NUNNS
against
GEE.

Post. 916.

(a) See also
14. Eliz. c. 11. &
18. Eliz. c. 11.
Post. 245.

OWEN and WOOD argued that the action did lie, for this covenant was broken before the indenture became void, and therefore it is not reason but the action should well lie; but they agreed that for the covenant for payment of the money no action did lie, because the indenture was void half a year before, by not making the obligation; and the indenture is, that "then and thenceforth" the indenture should be void," and so for all the time before he remaineth chargeable; as in case of lease for years, and for rendering rent, and for non payment, the lease to be void; although the lease becomes void, yet for rent due before debt lieth: so upon the statute of 13. *Eliz.* c. 20. of leases made by parsons, that upon *non-residency* for eighty days (a), the lease shall be void, and that all obligations, covenants, &c. for enjoyment of it, shall be void, yet it was adjudged, 26. *Eliz.* in *Walls and Cox*, that where a parson made such a lease by indenture, in which were divers covenants on the lessee's part, and after the lease, &c. became void by *non-residency*, &c. that for a covenant broke before, an action of covenant did lie.

Post. 600.

WRAY, C. J. said, the cases are not alike; for in that case the covenant was plainly broken, and the lease and covenants after became void; but here the thing that makes the indenture void, is the breaking of the covenant, so they are both at one time, and so he hath lost all his bargain, and all his benefit of the indenture, and the other party is at large, and so no priority here. But they would advise.—In *Trinity Term* following, it was adjudged for the plaintiff; but I heard not their reasons: but it was said that the reason was, that the intent of the party was, that it should be void only to have benefit of covenants broken *in futuro*, but for the covenants broken before it was never their intent, but that the party should have advantage of them.

CASE 40.

Simmons against Sweete.

A magistrate may bind to good behaviour a person who abuses him, but he cannot imprison except while in the duties of his office.

FALSE IMPRISONMENT. The defendant justified, because the plaintiff said to J. S. that the mayor of *Barstable* was a fool, which the mayor hearing of, commanded the defendant, being an officer, &c. to imprison him. Upon demurrer it was adjudged no plea, but for such words he might have bound him to his good behaviour, but was not to imprison him; yet if the mayor had been in public place of justice, and he had called him by such opprobrious words, he might imprison him.

Post. 689. Moor, 247. 11. Co. 98. 2. Roll. Ab. 78. 1. Haw. 89. 261. 2. Salk. 697. 1. Strange, 560. 3. Com. Dig. 488. 4. Bac. Abr. 698. Wood's Inst. 417. 2. Ld. Raym. 1029.

CASE 41.

Hubbard's Case.

In trover the place of conversion must be alleged.

ACTION for trover and conversion, and doth not alledge a place of conversion, which is a thing material, and being alleged in arrest of judgment, the bill was abated.

Ante 74. Post. 98. Cro. Car. 262. Bull. N. P. 46. 5. Com. Dig. 30.

Bland

Bland *against* Maddox.

CASE 42.

PROHIBITION. It was agreed clearly that a layman may be presented to a prebend, for *non habet curam animarum*; and COKE said, all the possessions of prebends were at first the bishops, 7. *Edw. 3. pl. 5.* 30. *Edw. 3. pl. 26.* and *de mero jure* do pertain to the bishops (a).

(a) See 3. *Jac. 1. c. 11.*

A layman may be presented to a prebendary.
2. *Roll. Ab. 341.*
3. *Co. 75. b.*
Moor, 261.
2. *Vin. Ab. 5.*
3. *Inst. 155.*

Carter *against* Goddard.

CASE 43.

ERROR. The case was, Goddard brought an *assumpsit*, and his writ was, in consideration that he would procure J. S. to assign to Carter such a term in certain lands, that he would pay him 40l. and alledged that he at his procurement had assigned, &c. but in the declaration it was not alledged that he had assigned the term, &c. and so no consideration; and this was assigned for error.

COKE prayed it might be amended; for when the clerk had the writ before him, which was good, and would not pursue it, but leave out a thing comprised in the writ, which he had before him for his information, this is amendable, 13. *Hen. 7. pl. 21.* 11. *Edw. 4. pl. 2.*

The opinion of the Court was, that it should be amended for that cause; and they said, so was the opinion of the Justices of the common bench.

A declaration may be amended by the writ.
Post. 119. 179.
435.
8. *Co. 159. a.*
1. *Com. Dig.*
323.
COWP. 407.
425.
DOUGL. 114.
1. *Term Rep.*
782.

King *against* Robinson.

CASE 44.

Easter Term, 29. Eliz. Roll 90.

ASSUMPSIT. The plaintiff declared, that the defendant did assume to do such a thing, &c. and upon *non assumpsit* it was found he did assume to do that and another, which he had not performed. It was resolved against the plaintiff: for the Justices said, where the plaintiff declareth that in consideration of one thing, the defendant assumed, &c. and the jury find in consideration of that and another thing he assumed, he had failed of his *assumpsit*; and the Justices denied the case of 32. *Hen. 8. Bro. "Verdit."*

NOTA. It was said that Pas. 14. *Eliz.* CATLIN did cause a record of Pas. 21. *Hen. 7.* to be read in the queen's bench, of a judgment given before FINEUX, C. J. And the case was, a woman in London had given to the plaintiff flattering words *æquipollentia* to a promise of marriage, and by that means he delivered to her money and other things, and she had caused the plaintiff to retain counsel for her, and to travel about her suits in *chancery*, and afterwards the woman refused to marry him, and married another, in deceit and fraud of the plaintiff: the woman traversed all the matters alledged against her, and part was found for the plaintiff, and part against him; and this was one matter found for him, that the woman had given unto him *blanda verba matrimonio æquipollentia*; and the plaintiff had judgment for those particulars that were

In *assumpsit* if the jury find that the defendant did undertake to perform the promise laid in the declaration and another, the plaintiff cannot recover.
Ante 41.
Post. 147. 149.
660.
Cro. Jac. 304.
Bull. N. P. 147.
1. *Salk. 438.*
COWP. 766.
1. *Term Rep.*
447.

KING
against
ROBINSON.

2. Vent. 131.
(a) 1. Term
Rep. 133. 240.
226.

were found for him, and he was amerced for the other; and this was an action upon the case, for the deceit in not marrying him; for he did not declare of any promise of marriage in fact. And CATLIN said it was to be noted, that the plaintiff had judgment, although but part found for him, and part against him, which is contrary to that (as he said) that hath been ruled here twice or thrice, That if an *assumpsit* be brought upon several things, and part only is found for him, the plaintiff shall have no judgment for any part. But SOUTHCOTE said, that the record shewn was an action for divers deceits; which being traversed, and part found for the plaintiff, and part against him, yet judgment may be given for the plaintiff, for the part, &c. but of an entire promise it is otherwise (a), for there failing in part, he fails in all.

CASE 45.

Bonifaut against Sir Richard Greenfield.

Land devised to
several executors
in fee, to the in-
tent that they
should dispose of
it, may be sold
by any of them
if the others re-
fuse to execute
the authority.
Ante 26.

Co. Lit. 113. 2.
Godb. 77.

THE case was, *Tremain* seised of the manor of *D.* devised the same to *J. S.* and three others, and to their heirs, to the intent and purpose that the devisees should set it for the best profit, and convert the money thereof coming, to the performance of his will; and in the conclusion of the will he maketh them four his executors, and dieth. One of the four refuses to meddle with the will or sale; and the other three sell the land in the life of the fourth; the question was, If the sale was good?

The case was argued by POPHAM and EGERTON; and it was adjudged that the sale was good by the three, either by the common law, or by the 21. *Hen. 8. c. 4.* for when he deviseth the land to four to sell, &c. and afterwards maketh them his executors, this doth *tant amount* as if at the first he had devised, that such his executors should sell; and in such a case at the common law, the sale by three, the fourth refusing, was good; for they three may perform the will without the fourth; but the statute maketh it clear.

Michaelmas

Michaelmas Term,

29. and 30. Eliz. In the Exchequer.

Sir Roger Manwood, *Knt.* Chief Baron.

Edward Flowerdew, *Esq.*

Thomas Gent, *Esq.*

} Barons.

The Queen against Blaucher:

CASE I.

THE question was, If upon a traverse to the certificate of the Bishop of Lincoln for non payment of tenths upon demand, nor within forty days after, whether the benefice be void by the 26. Hen. 8. c. 3. that enacts, that after such default, and certificate thereof made to the court under the seal of the bishop; that it shall be void?

Tenths are to be paid at the parsonage, and a person authorised by the bishop must demand them, otherwise the certificate is traversable.
Post. 395.

MANWOOD, Chief Baron, said, it hath been a great question if this certificate of the bishop be peremptory, or that the party shall be admitted to his traverse of it. And upon great deliberation between the Barons, and by the advice of the other Justices, it hath been clearly held that the certificate is not peremptory, for the bishop doth it only as an officer, *scilicet*, as collector of the tenths, and not as a judge; as in the case of bastardy. And here is to be a default in the parson, *viz.* non payment, which is triable *per pais*; for otherwise all the parsons of England may be put out of their parsonages by such *nude surmise*, and bare certificate without any answer; and the law never intended to make the certificate so peremptory.

Moor, 541. 915.
2. Inst. 628.
Savil. 1. 26.
1. Bl. Com. 235.

BARON GENT said, he had known it so ruled in his experience upon an issue, upon avoidance or non avoidance, upon that statute in a *quare impedit*.

And all the Barons held, in the principal case, that the officer of the bishop, who is to demand the tenths, ought also to be authorised to receive them; for he cannot appoint them to be paid at another place, or to another person; for the parson is to pay them at his own house, and to the person that demands them in the name of the bishop: and they said it had been so formerly ruled (a).

(a) By the statute 2. & 3. Ann. c. 11. all the revenue of first-fruits and tenths is vested in trustees, to form a fund for the augmentation of poor livings.—By 5. Ann. c. 24. and 6. Ann. c. 27. benefices under

50 l. a year are discharged from the payment of these tributes; and the collection of them is further regulated by 1. Geo. 1. st. 2. c. 10. and 3. Geo. 1. c. 10.

Hilary Term,

30. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*Sir Francis Gawdy, *Knt.*John Clench, *Esq.*Robert Schute, *Esq.*} *Justices.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1. Arthur Robfert against Andrews, Ann his Wife, and Cocket.

Trinity Term, 22. Eliz. Roll 583.

If a person receives money by the hands of a servant for the relief of others, he may be charged as having so received it, in an action of account, tho' no agreement was made that he should account; and if he does not appear after judgment *quid computet*, a *capias ad computandum* lies; and the error of awarding it to a different county than where the action is brought, is helped by the statutes of *jeofails*. The plaintiff may deny that he has expended the money for their use, without saying or any part; and (if the defendant interpleads) he shall have judgment to recover damages and costs; but he cannot alledge *diminution* after *in nullo est erratum* to the want of an original; but then this error must not be assigned *hors de record*.

ERROR of judgment in the common bench, in an account which is entered there, *Term. Pasch. Rot. 940.* where *Andrews* and his wife and *Cocket* declared against the said *Arthur Robfert*, that he on the 20th of *August, 10. Eliz. apud Fille, in com. Norf.* was the receiver of the money of the said *Cocket* and *Ann, dum sola fuit, viz.* by the hands of *Jo. Wase*, 100l. to render an account when he should be required; yet the defendant being required to do it had refused, to their damages 200l.

The defendant pleads that he was never their receiver of the said 100l. or of any parcel of it, by the hands of the said *Jo. Wase*, to render an account, &c.

Upon this they were at issue; and it was found by special verdict that the 10th *Aug. 10. Eliz.* one *Osbert Munford* gave the said 100l. for the relief of the said *Cocket* and *Ann*, and delivered the same to the said *Jo. Wase*, then his servant, to the intent he should deliver it to the said *Arthur Robfert*, for the relief of the said *Ann* and *Cocket*; and that he the said 20th *Aug. 10. Eliz.* did deliver it to the said *Arthur Robfert*, for the relief of the said *Ann* and *Cocket*, according to the said intent; and if upon the whole matter *Arthur Robfert* shall be said to be the receiver of their money by the hand of the said *Jo. Wase, prout, &c.* they prayed the discretion of the Court. It was adjudged he shall be said to be their receiver, *prout, &c.* and that he shall account with the said then plaintiffs for the said 100l.

Afterwards by virtue of a writ of *capias ad computandum*, directed to the sheriffs of *London*, the said *Arthur Robfert* was taken and brought to the bar, and committed to THE FLEET, *quousque, &c.* and afterwards auditors were assigned to him by the Court to hear his account, and he found mainpernors in 200l. to enter into account before them and to finish it, &c. and to appear in court *de die in diem* until judgment was given thereupon, and to

satisfy

satisfy all the arrearages which by the Court he should be adjudged to satisfy, or to render his body to prison until he had satisfied. And hereupon he entered into account, and alledges, that he had maintained the said *Ann dum sola fuit* (who afterwards intermarried with *Andrews*) and the said *Cocket* by the space of eight years, at *D.* in the county of *M.* and had expended the said one hundred pounds for the relief of the said *Ann* and *Cocket*; and so prayed to be discharged. Upon this they were at issue, that he had not expended the said 100 l. for the relief, &c. and it was found for the plaintiffs, and damages assessed above the said 100 l. *ratione interplacitationis compoti prædicti* twenty pounds, and costs ten pounds. Upon this verdict, judgment was given for the then plaintiffs, and the costs were increased by the Court; and upon this judgment *Arthur Robsert* brought a writ of error.

ROBERT
against
ANDREWS, &c.

FENNER, *serjeant, for the plaintiff*, assigned divers errors.—FIRST ERROR, The matter in law, which was adjudged in the common bench, *viz.* that they declared he was their receiver to render an account of the 100 l. whereas it was found he received the money for their relief, and not to account.—But THE COURT held clearly, that when he received the money in that manner, he received it to their use; and is accountable, if he did not expend it; and it is as if he had received it to their use by exprefs words.

SECOND ERROR, That they declared he was their receiver *ad computandum*; and he is not accountable unless he did not expend it in their maintenance; and so ought to have a special writ, and declared specially. *Sed non allocatur*; for they to whose use the bailment was made can have no other writ; for they cannot suppose he received it *ad merchandisandum*, for that is false, and he had no such authority; and in that case his costs were to be allowed him.

Post. 805.
1. Leon. 37

THIRD ERROR, That in the writ and count he is supposed to be receiver of their money by the hands of *Jo. Wase*, whereas it ought to be by the hands of *Osbert Munford*; for *Wase* delivered it as his servant, and it may be said the delivery of the master; and by the hand of the master the receipt ought to be supposed.—COKE answered, that whereas the servant doth contract, this shall be said to be the contract of the master, and he only charged for it, 11. *Edw. 4. pl. 6.* But here they convey only a possession by the hands of *Wase*, but conveyed no interest by him; and therefore may count that he received it by his hands.

Post. 614.
3. Bl. Com.
163.

FOURTH ERROR, For that the writ was, and they accounted that he was their receiver, to render an account when required; which is false, for no request was mentioned upon the delivery.—COKE. The law implieth it, 21. *Edw. 4. 42.*

FIFTH ERROR, The writ of account was brought in *Norfolk*, and the cap' *ad computandum* was awarded to *London*; whereas it ought to have been to the sheriff of the county where the action was brought.—COKE said it was helped by the statute of *jeofailes*; and he appeared upon this process, and so had made it good; and error in process cannot be alledged after *in nullo est erratum* pleaded; for if it had been alledged, the other party might have alledged diminution.

ROBERT
against
ANDREWS, &c.

A general charge
ought to be an-
swered in every
part, but it is
sufficient to an-
swer a collateral
issue in the
words of the
plaintiff.

Ld. Ray. 42.
5. Com. Dig. 89.
Co. Lit. 282. a.

A writ of error
removes the re-
cord only, and
not the writs.
Post. 153. 155.
271. 281. § 37.

1. Leon. 23.
Cro. Jac. 479.
1. Roll. Ab. 790.
Bridg. 57.
Cowp. 343.

Damages and
costs may be
given in an ac-
tion of account.

1. Roll. Ab.
125.
3. Wilf. 117.

SIXTH ERROR, For that before the auditors, the defendant alledged, that he had expended the 100 l. for the relief of the plaintiffs; and they replied, that he had not expended the 100 l. but said not, nor any part; for if he had expended any part, it is not reason he should give an account of that part; and judgment given upon an ill issue is erroneous.—COKE. That inasmuch as it is a collateral issue, he is only to join with his adversary, and is to add nothing to it; but in a general issue it is otherwise: as in an action of waste for cutting twenty oaks, the defendant ought to plead, that he did not cut the said twenty or any of them; but in debt upon an obligation, that he shall do no waste: and the breach is assigned that he cut twenty oaks, it is sufficient to plead he did not cut the said twenty oaks, *modo et formâ*, &c. 2. Mar. Dyer. 115.

SEVENTH ERROR, It doth not appear to the Court that there was an original writ, for it is not certified; and the defendant hath pleaded *in nullo est erratum*; and therefore cannot alledge diminution, 20. Edw. 3. Error 2. 9. Edw. 4. 32. and judgment given where there is no original is erroneous.—COKE. If the plaintiff assigneth for error that there is no original, and the defendant pleads *in nullo est erratum*, he cannot after alledge diminution; but this error being assigned *hors de record*, the Court here may write to the common bench to certify it; for by the writ of error, all is certified which is with the chief justice there, which is only the body of the record; but the original and judicial writs remain with the *custos breviarum* and other officers; which are never certified but where error is assigned for want of them.

EIGHTH ERROR, That the plaintiff had judgment to recover damages and costs, and it is a positive law, he shall have none in a writ of account; as 2. Ric. 2. & 14. E. 3. Damages. And although there is a precedent in the *Book of Entries*, where in an account damages were given, the reason is, because the goods were delivered *ad merchandisandum*, and to have increase; but it is not so in this case. But it was answered, that in the first judgment to have an account, damages shall not be recovered; but here damages are not given *ratione detentionis compoti*, but *ratione interplacitationis compoti*, where the plaintiffs are delayed by the defendant's plea: and although goods are given to merchandise, yet he shall not recover damages for the detainer, but all shall be put in the arrears of the account. And in the old MAGNA CHARTA it is shewn in what writs damages shall be adjudged, and a writ of account is one of them. And in the *Book of Entries*, fol. 17. damages are given in account. Afterwards, notwithstanding these errors, the judgment was affirmed.

By 4. Ann. c. 16. an action of account is given against the executors and administrators; but the most ready and effectual way to settle these matters of account is by

bill in the court of equity; and therefore actions to compel a man to bring in and settle his account, are now seldom used.

CASE 2.

Crow's Case.

Judgment in
battery reversed
for want of the
quid capiatur. Post. 107.

ERROR of a judgment in trespass of assault and battery, because the judgment was *quod sit in misericordia*, whereas it should

5. Co. 39. b. 2. Co. 59. 2. Cro. Jac. 224. Savil. 37. 5. Com Dig. 179. Poph. 203. 2. Saund. 47.

be *quod capiatur* (a). TANFIELD moved, that this is for the plain- CROW'S CASE.
tiff's benefit, and is the default of the clerk, and so shall not be
assigned for error; but the judgment for that cause was reversed.
29. Edw. 3. pl. 29. 14. Eliz. Dyer, 315.

(a) By 5. & 6. Will. & Mary, c. 12. C. B. they now enter that the fine is re-
no writ of *capias* shall issue for the fine to mitted; and in B. R. no notice is taken of
the king; but the plaintiff shall pay 6s. 8d. any fine or *capias* at all.—3. Bl. Com. 328.
and be allowed it against the defendant Carth. 390. Salk. 54.
among his other costs; and therefore in

Levellin against Watkins.

CASE 3.

ERROR to reverse an *outlawry*, because the original was against Outlawry re-
Levellin, with a single *L*, and all the mesne process was *versus* reversed.
Llevellin, with a double *Ll*. And the process was against two, and Post. 104. 198.
the sheriff returned, "*quod non sunt inventi*," and doth not say, "*nec* 243.
"*eorum aliquis*." And the judgment was for these causes reversed.

Grifling against Wood.

CASE 4.

ERROR, for that in an action in an inferior court, the declara- Custom cannot
tion was in *English*, whereas by the 36. Edw. 3. c. 15. all prevail against
entries are to be in *Latin*: and although it was said the custom positive law.
there was so used, yet this cannot be good against a statute, and Post. 185.
the judgment was reversed. And EVENS said, that divers indict- Ca. tem. Hard. 7.
ments had been discharged for this cause (a). Dougl. 204.
3. Ter. Rep. 271.

(a) By 4. Geo. 2. c. 26. and 5. Geo. 2. c. 27. all proceedings are to be in English.

Devenly against Ann Welbore.

CASE 5.

ASSUMPSIT against the defendant as executrix of *George Wel- Where a promise*
bore. And declareth, that in consideration that the plaintiff is to be perform-
would assure certain lands to *Thomas Percy* at the instance of the ed at the request
said *George*, he assumed, that if *Thomas Percy* did not pay him yearly of the plaintiff,
upon request ten pounds, and ten load of faggots, that he would the request, and
pay them (a); and alledgeth in *facto*, that he did assure the land, &c. the time and
to the said *Thomas Percy*; and that the said *Thomas Percy*, *licet se-* place where it
pius requisitus, did not pay the said ten pounds, and ten loads of was made, must
faggots; nor the said *George* in his life, nor the defendant since be expressly al-
his death. Upon *non assumpsit*, it was found for the plaintiff. Ante 74.
COKE moved in arrest of judgment, that the declaration was not Lut. 231.
good; for the payment of the ten pounds, &c. was to be upon Owen, 109.
request, and a request is material, for otherwise the defendant is not 1. Saund. 33.
chargeable; and therefore the request, and the time and place where, 1. Brownl. 10.
ought to be expressly alledged: and of that opinion was the Court, Jones, 56. 83.
and judgment given, that the plaintiff *nihil cap' per billam*. Sav. 72.

(a) See 29. Car. 2. c. 3.

CASE 6.

Wikes against Morefoots.

A *bonâ fide* purchase of a horse in market overt, changes the property.

Post. 485.

Sed vide

Owen 17.

1 Leon. 153.

Jones, 163.

2. Inst. 717. 2. Term Rep. 750.

TRESPASS. It was held *PER CURIAM*, that if one takes my horse, and sells it in a market overt, and toll paid for it, but he enters his name falsely in the toll-booth; yet the sale is clearly good, and the property altered, if there was no covin in the vendee: for the *misnomer* of the party is nothing to him, when he buys it *bonâ fide*, and is not *consuant* of the tortious taking; and they advised the plaintiff to discontinue his suit, and ordered that small costs should be assessed: and it was so done.

CASE 7.

King's Cafe.

What acts of misbehaviour will amount to the forfeiture of a recognisance for good behaviour,

Palm. 126.

Moor, 249.

4. Inst. 180.

2. Hen. 7. pl. 2.

2. Roll. 150.

199. 228.

Cro. Car. 499.

2. Leo. 160.

Godb. 622.

Cro. Jac. 412.

Lamb. 116. 118.

B. R. H. 158.

1. Burr. 703.

1. Hawk. P. C.

258. 262.

KING was indicted, for that whereas he was bound by recognisance to be of good behaviour, he had said to one *Kirton*, that "he was a pelter, and a teller of lies, and a drunkard; and that he would make him a poor *Kirton*; and that he had entered and broke the close of *Kirton*;" for which an action of trespass *vi et armis* lieth. And the question was moved by *COKE*, If these be causes of the breach of his recognisance? for it is a common course in such cases to indict men, which will be evidence in a *scire facias* upon the recognisance.—*WRAY* and *GAWDY* conceived at first, that they are no causes of the breach of the recognisance; for the party doth not break his good behaviour, except he doth something in act or shew which tends to the breach of the peace; as if he goeth in warlike manner with weapons, or is in company of riotous malefactors, although nothing be done; or threatens another to beat him, or to fight with him. These (although nothing be done) are breaches of the good behaviour. But when he speaks only words of reproach, which may procure another to break the peace, this is no breach of the good behaviour. And they held clearly, that the entry into the close was no breach, being done peaceably; and he might pretend title to it; although in an action it is supposed to be *vi et armis*, and *contra pacem*. And *WRAY* said, that nothing shall be said a breach of the recognisance, but that which sounds to the hurt of another, and by intendment may be a breach of the peace; as assault, menace, &c. And he said, if one be leading of his horse, and he that is bound to his good behaviour doth take it from him, this peradventure may be a breach of the good behaviour; for it is an assault upon his person, although he take it peaceably.—*CLENCH contra*. For the words being spoken in disdain and reproach, shall be said a breach of the recognisance; for it may be cause of the breach of the peace, as well as carrying of weapons, or having a great company following him, as 2. Hen. 7. is; and the words being malicious and opprobrious, give occasion of blows; but the entry into the close is no breach.—*SCHUTE* doubted of the words, because they were opprobrious and spoke in malice, and do provoke another to break the peace. And the Court said they would advise. Vide 4. Inst. 180. & 181.

Smith's

Smith's Case.

CASE 3.

HE was indicted at the sessions of the peace in the county of *Oxon*, for forging a false deed, against the statute of 5. *Eliz.* c. 9. And now TANFIELD moved, that this indictment was not well taken before the justices of the peace, for they have no power to take it; for the statute is, that Justices of Oyer and Terminer, and the Justices of Assise, in their public and open session, shall have power to enquire of such offences; and giveth no authority to justices of the peace in their sessions to enquire of it. And of that opinion were all the Justices, that the indictment taken before them was void; for they have several and distinct authorities and commissions: one, to hear and determine, which is to be kept in a place, and at a time certain, and is to be adjourned to a certain time; and a commission of the peace, by virtue whereof they are to keep their ordinary sessions; and this indictment was taken before them *ad sessionem pacis*. And EWENS said to them, "So it hath been ruled within these two years." But POPHAM, *Attorney General*, said, that he had known divers such indictments taken, and never contradicted, and the parties had suffered the punishment of the statute. And thereupon the Court said they would advise: but in this term the indictment was discharged.

The sessions have no jurisdiction in forgery by 5. *Eliz.* c. 9. Post. 601. 697. 9. Co. 118. a. b. 1. Hale, 687. 2. Hale, 44. Crompt. J. 56. b. 2. Hawk. P. C. 59. Cowper, 369.

Higham against Reynolds.

Michaelmas Term, 29. & 30. Eliz. Roll 562.

CASE 9.

TRESPASS for entering and breaking his house, and cutting six posts of it, 1. *May*, 28. *Eliz.* The defendant pleads, that as to the breaking of the house, and all the trespasss except the cutting of the three posts of the house, not guilty. And as to the cutting of the said three posts, he said, that upon the said first of *May*, 27. *Eliz.* it was the freehold of one *Anthony May*, and he by his command entered and cut the said posts, which is the same trespass, &c. *ABQUE HOC*, that he was guilty of any trespasss before the said seven and twentieth year, &c. but doth not traverse the time after, &c. And upon this plea it was demurred; and it was argued by BRECKNAM of the one part, and by ALTHAM of the other part.—And first, exception was taken, for that the defendant pleads as to all the house not guilty, and after justifieth as to the three posts; and so pleads not guilty to one thing, and justifieth for the same thing, which is no good pleading; as 21. *Hen. 7. pl. 31.*—The second exception and cause of the demurrer principally was, for that he saith it was the freehold of *Anthony May*, and justifieth by his command, 27. *Eliz.* which was a year before the trespasss supposed, and traverseth the time before 27. *Eliz.* but saith nothing to the time after 27. *Eliz.* and relied upon 5. *Edw. 4.* and other books, that he ought to traverse the time after, as well as the time before.—Third exception, that he saith it was the freehold of *Anthony May*, and doth not aver his life; but that exception was over-ruled, that it shall be intended he had the fee, when he pleads generally it was his freehold.—ALTHAM answered as to the two other exceptions; and said as to the first, that although the defendant pleads not guilty generally to the whole house, yet he may after justify as to parcel; for he hath pleaded not guilty to all, except this special parcel, and so is

In trespasss for breaking a house the defendant may plead to all the trespasss *præter* three posts not guilty, and justify for the three posts; and if he saith it was the freehold of *A.* who demised, &c. he need not aver that *A.* is alive; but if he pleads it was the freehold of *A.* at such a time, and traverses the time before but not after, it will be bad.

Post. 860. 4. Co. 14. 9. Co. 27. 2. Salk. 641. 2. Term Rep. 439.

35. *Hen.*

HIGHAM
against
REYNOLDS.

35. *Hen. 6.* And as to the second exception, he said the plea was good, although he doth not traverse the time after. For when he pleads his freehold, or the freehold of another, it shall be intended so to continue, except the contrary be shewn, and therefore need not traverse the time after; and so is 5. *Edw. 4. pl. 15.* And to this opinion THE COURT inclined; but they would advise of it; but afterwards it was adjudged for the plaintiff.

CASE 10.

Gosnal against Kindlemarsh.

In pleading 13.
Eliz. c. 20. it
must be averred
that the party
was absent 80
days *et ultra*; for
the statute says
‘above 80 days.’
Post. 262. 49c.

Diggs, 126.
3. Bulst. 202.
Moor, 540.
3. Bac. Abr.
368. 371.
Cowp. 341.
2. Ter. Rep. 749.

DEBT upon an obligation, dated 25. *March, &c.* The condition was, that the defendant be not absent from his benefice by the space of eighty days, nor permute or resign without the assent of the patron, that then, &c. The defendant pleads the 13. *Eliz. c. 20.* by which all leases of parsons made of their benefices where they are absent, by eighty days *et ultra*, and all obligations for enjoying them, shall be void; and alledgeth, that he was absent by the space of eighty days, but saith not *et ultra*. Upon which plea it was demurred. It was moved by COKE, that this was an incurable fault in the plea; for he ought to have said he was absent eighty days *et ultra*; for he may be absent for eighty days, and come again in the night of the eightieth day; and this must be expressly alledged, and not by implication. *Comment. 143.*—And of that opinion was the whole Court; but they moved the parties to agree, and in the mean time they would stay judgment.

CASE 11.

Bagnall against Stokes.

The spiritual
court must re-
ceive such evi-
dence as would
be proof at com-
mon law.
Post. 595. 666.

1. Vent. 335.
2. Inst. 608.
2. Roll. Abr.
291. 299.

Hob. 12. 12. Co. 65. Het. 87. Show. 158. Comb. 160. Holt. 752. 3. Mod. 283. Ld. Ray. 320.
346. 1161. 1172. 1211. Salk. 547. Carth. 142. Cowp. 424.

PROHIBITION. And surmised, that the defendant sued him, being an executor, in the spiritual court for a legacy; whereas the plaintiff had a release, but had only one witness to prove it. A consultation was granted: but if he had surmised that he had pleaded this release in that court, and produced his witnesses; and that they would not allow it, because it had not two witnesses; this had been a good surmise. And it was said the plaintiff is at no mischief; for he may have a prohibition after sentence given in that court.

CASE 12.

Hamond against Barker.

If a man ac-
knowledges and
inrolls a deed, he
cannot after-
wards plead du-
ress.

Moor, 42, 46.
1. Roll. Ab. 862.
Owen, 142.
2. Inst. 673.
Cro. Jac. 291.
Gillb. Uses, 300.
Cowp. 597.

TRESPASS. Upon evidence the case was, *J. S.* by deed inrolled in chancery, bargained and sold a house and certain goods to the plaintiff, and after took the goods again, and would avoid this bargain and sale inrolled, by *duress of imprisonment*.—GODFREY said it cannot be avoided by such *nude matter in fact*, 7. *Edw. 4. pl. 5.* 39. *Hen. 6. pl. 32.* 13. *Edw. “Estoppel” 18.* 48. *Edw. 3. pl. 33.* for being inrolled, it is a thing of record.—MORGAN *contra*. And he said, a deed inrolled is no record, but a thing recorded, 16. *Hen. 7. pl. 5.* and cited BROWN and WESTON’s opinion in one *Morley’s Case* accordingly.—THE COURT said, the case was doubtful, and they would advise. But afterwards they conceived it would be hard to avoid the deed by *duress*: but no judgment was given, because the parties agreed.

Richard Scovel *against* Jo. Cabel.

CASE 13.

Trinity Term, 29. Eliz. Roll 193.

EJECTIONE FIRMÆ. The case was, *Leverfage* made a lease to Stephen Cabel, Jo. Cabel, and William Pain, by indenture, "to have and to hold to them for term of their lives. PROVISO, "and it is covenanted and granted between them, that the second "shall not occupy the land during the life of the first; and the "third shall not occupy during the life of the second." The first occupieth all and dieth, and then the third enters, and made a lease to the plaintiff, who was put out by the defendant; and all this matter was found by special verdict. The question was, If this *proviso* be a limitation of the first estate, and severeth the estate which was given to the three jointly, and makes each of them in remainder one after the other? or, Whether it be only a *nude covenant*?—HARRIS, *for the plaintiff*. There is a joint estate given to them expressly by the premises of the deed; and the words after in the *proviso* cannot sever the estate, and divide it so that one shall take after the other; and the *proviso* is void and repugnant to the premises; and he cited a case in *Bendloe* to be so ruled, 14. Edw. 6.—HEAL *contra*. The *proviso* is an explanation of the premises of the deed, and may stand with it; and is a limitation of their estates, how each of them shall take; and cited 8. Edw. 3. a lease unto two, *habendum* to one for life, remainder to the other. And he said he had known it resolved in this court, where a lease was made to three, *habendum* to them for their lives, *successive prout nominantur* in the deed; this made each of them in remainder after the other. And in the common bench it was ruled, that where a lease was made to three for their lives, *habendum* to them, to the use of the first for life, and after to the use of the second for his life, and so to the third; they were several estates one after another: so here, their intent appearing to be so.—GAWDY held strongly, that the *proviso* shall not controul the express limitation before.—SCHUTE and CLENCH *contra*; because their intent appeareth; and one cannot have covenant against the other, if they occupy not according to the limitation of their estates (a).

Carden *against* Tuck.

CASE 14.

EJECTIONE FIRMÆ. Upon special verdict it was found, that J. S. being seised of a messuage, to which a garden and curtilage did belong, joined together and inclosed with a wall, and there was no way to the garden but through the messuage. He devised the messuage to his second son in fee, and mentioneth not the garden or curtilage, nor faith *cum pertinentiis*. If the garden and curtilage pass? was the question.—After argument by HEAL *of the plaintiff's part*, and DREW *for the defendant*, it was adjudged, that the garden and curtilage did pass: for they agreed clearly, that a curtilage is as parcel of a house, and shall pass in case of a feoffment without saying *cum pertinentiis*; as a stable or dove-house. They doubted of a garden, because it is but a place of pleasure; but afterwards they resolved the garden did pass; for it is as well for necessity as pleasure.

Lit. Rep. 6. See the case of Clements v. Collins, 2. Term Rep. 499.

John

CASE 15.

An action on the case will lie for playing with false dice, and thereby winning the plaintiff's money.

F. N. B. 95.
1. Roll. Abr.
100.
Moor, 776.
Cro. Jac. 234.
1. Hawk. P. C.
344.
Cowp, 664.
2. Term Rep.
439.

John Harris against Nicholas Bowden.

ACTION UPON THE CASE. Because the defendant at D. enticed the plaintiff to play at dice, at a sport called FIVE OR NINE, intending to deceive him and get his money; and he by the defendant's persuasion did play with him at the said sport; and the defendant, in playing at the said sport, delivered to the plaintiff *quosdam talos veraciter titulos* to play with; and when the dice came to the hands of the defendant, he by practice, falsely and fraudulently, *quosdam alios talos falsè et subdole titulos*, quos numeros *quinque vel novem, aliquo jactu unquam attingere scivisset, adtunc et ibidem projecit*, and then played with the said false dice (a), by which the plaintiff lost to the defendant divers sums of money, amounting to forty-one pounds six shillings and eight pence. And the defendant falsely and fraudulently, under the colour of getting, took and carried away the said money, to his damages two hundred marks. The defendant pleaded not guilty, and it was found against him; and it was alledged in arrest of judgment, First, that the word "*talos*" was no word for "*dice*." *Sed non allocatur*; for it is a proper word for dice. Secondly, that the word "*lucisset*" was written with a c, which is for shining; but the record was viewed, and it was written with an s: and the plaintiff had judgment.

(a) See 16. Car. 2. c. 7. and 9. Ann. c. 14.

CASE 16.

Inclosing a common is not a common nuisance; nor can it be done *vi et armis*; and an indictment for it *tested* "gaol-delivery" is bad.

Post. 664.
22. Aff. 6.
2. Roll. Abr.
83.
1. Vent 26.
6. Mod. 453.
2. Wilk. 57.
1. Burr. 259.
1. Hawk. P. C.
361.
2. Term Rep.
391.
(a) Ante 361.

William Willoughby's Case.

HE was indicted before the Justices of Assize, for that he *vi et armis* had inclosed certain land, in which *Williams* and others had common, time out of mind. Exception was now taken to the indictment, because it concerneth only the interest of particular persons, and was no common nuisance to the queen's people; and it concerning a private commodity of certain persons, and not of the queen, or her people in general, the parties grieved are to have their action upon the case, 27. Aff. 10. And *Madox's Case* was adjudged the last term (a), that for a private commodity, remedy shall not be by indictment.—2. Exception, that it was *vi et armis*, and a man cannot inclose his own ground *vi et armis*.—3. Exception, that the *teste* of the indictment was at the gaol-delivery, in the county of *Nottingham*, before ROBERT SCHUTE, FRANCIS GAWDY, and other Justices of the Peace of the queen, &c. in the said county; and for this cause it was alledged to be void, for at a gaol-delivery they have no authority to take such indictments (b). And this was held a material exception; but the Justices said they would advise, &c.

(b) Sed vide 2. Hawk. P. C. 32. and the cases there cited, *contra*.

CASE 17.

Knight against Fortipan.

Michaelmas Term, 29. & 30. Eliz. Roll 265.

Surrender by copyholder for life and an infant in remainder, does not bar the entry of the heir to him in remainder.

Post. 148. 662.
484. 717.
4. Co. 22. 1. Leon. 95. Moor, 596. 2. Com. Dig. 493. Cro. Car. 103. Gilb. Ten. 193. 1. Term Rep. 302. 600.

TRESPASS. The case was, A copyhold was granted to one for life, remainder to an infant in fee; they join in a surrender to A. B. who was admitted tenant for life, and he in the remainder dies, and the heir of him in the remainder enters; and, If he may enter, or shall be put to his *dum fuit infra ætatem*? was the question. And it was argued by TANFIELD and ATKINSON, and the entry was adjudged lawful. For a surrender is but a conveyance by matter of fact, and no higher; and the heir may enter, and bring trespass before admittance.

Trewinian against Howell.

CASE 18.

ERROR of a judgment in *assumpsit* against the now plaintiff, as executor to *T. Trewinian*, his brother; in which *Howel* declared, that whereas the testator was indebted to him in a certain sum, the said *Trewinian*, the then defendant, did assume, that if he had goods sufficient, that he would pay him; and alledged, that he had goods sufficient. Upon *non assumpsit*, it was found for the then plaintiff, who had judgment. Upon this, error was brought; and the principal error assigned was, that there is no sufficient consideration alledged; for the having of goods was no consideration; but in consideration he would forbear to sue, &c. Post. 406. this had been a good consideration. But it was said of the other party, that he being executor, his promise (he having assets) doth bind him, for he is in duty to pay it.—**DANIEL** said, it was adjudged in one *Hudson's Case*, that a promise of the executor to pay a debt, is binding, if he hath assets, otherwise not. And so **COKE** said, it was adjudged in *Sir William Cook's Case*, that such a promise is good without any other consideration, if he hath assets of the testator in his hands, otherwise not; for the consideration is only by reason of the act and debt of the testator; and, therefore, shall bind me no further than the goods of the testator amount.—Second error, that the judgment was general, and not *de bonis testatoris*, as it ought to be; for by such a general judgment, he shall be charged of his own goods.—**THE COURT** said, they would advise. But at another day (*absente WRAY*) it was adjudged, the judgment should be affirmed; for it was a good *assumpsit*, and he shall be charged *de bonis propriis*, being of his own promise (a).

Assumpsit will lie against a testator in consideration of his having sufficient assets; and if he expressly promise, the judgment shall be *de bonis propriis*.

Post. 406.

Latch. 21.

1. Vent. 41.

9. Co. 94. a.

1. Vesey, 125.

Cowp. 284.

(a) Vide the case of *Hawley v. Saunders*, Cowp. 289. and *Richards v. Brown*, Dougl. 115.

Osbaston against Garton.

CASE 19.

ERROR of a judgment in an *assumpsit*; where *Garton* declared, that *Osbaston* did assume to pay to him for every stone of wool he delivered to him six shillings and ten-pence; and saith, that he delivered to him so many stone of wool as amounted to thirty-nine pounds ten shillings; and alledged further, that *licet sæpius requisitus* to pay the said thirty-nine pounds ten shillings, he had not paid. The defendant pleaded *non assumpsit* to pay the said thirty-nine pounds ten shillings, *nec aliquam inde parcellam*; and found against him, and judgment. Two errors assigned.—1. That he saith *licet sæpius requisitus*, but sheweth not the day and place of the request; and this is not properly a debt, but riseth by reason of the delivery of the stones of wool; and therefore ought to expressly alledge a request, being a duty that accrueth with the commencement of the promise, and not before: and of that opinion was the whole Court.—2. Error, for that the issue was, that he did not assume to pay the thirty-nine pounds ten shillings, &c. which is not alledged in the declaration; but that he assumed to pay for every stone of wool six shillings and ten-pence, which amounted, &c. and so no issue was joined: and of that opinion was the Court, and the judgment was reversed.

Assumpsit for goods sold and delivered, must alledge a promise to pay their value; a special request of payment; and the day and place when and where such request was made.

1. Saund. 33.

Ante, 74.

Sed vide

1. Strange, 88.

Yelv. 66. 121.

3. Bull. 258.

Cro. Jac. 639.

Albany

CASE 20.

A writ of error must include the costs *de incrementis*, as well as the costs and the damages assessed by the Jury.

1. Sid. 269.

Albany against Sir Anthony Sturline.

ERROR in the exchequer-chamber upon a judgment in *bancus regis* in an *assumpsit*. The writ of error supposed, that the recovery in the action was of 222*l.* damages, whereas in truth the damages and costs assessed by the jury did amount to so much; but the Court did adjudge to the plaintiff *de incremento* twelve pounds; so as all the damages did amount to 234*l.* and it was said now in court, that there is no recovery of 222*l.* only; so the writ was no warrant to remove the record, 9. Hen. 6. But POPHAM moved, that the writ of error was well brought; for it needed not to have mentioned all the damages; but only what was found by verdict, and might leave out the other.—*CURIA contra*: for when the damages are assessed, they are entire, and cannot be divided; and thereupon awarded, that the writ of error was not well brought.

Michaelmas Term,

29. and 30. Eliz. In the Common Pleas.

CASE 21.

Broker against Charter.

Roll 2116.

An executor may refuse to act, by parol; and if he once refuses, he cannot afterwards administer the effects.

Went. 37.
Owen, 44.
Moor, 272.
Gilb. on wills, 425.

1. Leon. 135.
2. Mod. 146.
9. Co. 37. a.
1. Salk. 3.
1. Bl. Rep. 456.
3. Burr. 1465.

TRESPASS. It was found by verdict, that Sir Ralph Rowlet being possessed of a term, did make his will, and thereof did make BACON the Lord Keeper, CATLIN Chief Justice, and others, his executors, and devised the term to LORD CATLIN, and died. All the executors writ a letter to DR. DALE, Judge of the Prerogative Court, that they could not attend the execution of the will, and desired him to commit the administration to Henry Goodyer, the next of kin to the testator; and the administration was accordingly granted: but the Register entered the cause, for that the executors did defer *suscipere onus testamenti*. After this, CATLIN entered upon the land devised to him, and granted it over. The doubt was, If this grant was good? First, If the letter be a sufficient renunciation? Secondly, If they once refuse, if they, after administration granted, may administer at their pleasure? DR. FORD declared to the Justices, that by the civil law, a renouncing may be as well by matter in fact as by a judicial act, and they may refuse by parol; and cited a rule in the civil law, *Non vult esse hæres, qui ad alium vult transferre hæreditatem*; and, *Hæreditas est totum jus quod defunctus habuit*. And to the second matter he said, *Qui semel repudiaverit hæreditatem, amplius hæreditatem petere non potest*; and, *Qui semel repudiaverit* shall not after be executor, *quia transit in contractum*; and that executors cannot refuse for one time, but for ever; but they may pray time to advise of taking upon them the executorship, and it ought to be granted; and in that case the ordinary is to grant in the mean time letters *ad colligendum*, &c. but is not to grant administration. And for these reasons there being a refusal, the grant made after administration committed, was void; and so was the opinion of the Court.

Easter

30. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*

Sir Francis Gawdy, *Knt.*

John Clench, *Esq.*

Robert Schute, *Esq.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

} *Justices.*

Prowse against Cary.

CASE 1.

ACTION for words, "Thou hast procured false witnesses to swear in such an action." Upon not guilty, it was found for the plaintiff.—GLANVILLE moved in arrest of judgment, that the words are not actionable; for it is not alledged, that he suborned or procured them to swear falsely; or that he knew they would swear falsely.—CURIA *contra*. For when it was said, he procured false witnesses, it is intended in *malam partem*, that he procured them to swear for him, which would swear falsely. But if the words had been, "You brought in false witnesses," action did not lie for them.

Words charging another with subornation of perjury are actionable. Post. 99.

1. Mod. 201.
2. Roll Rep. 410.
Cro. Jac. 158.
Yelv. 72.
2. Salk. 696.

Mildward et alii.

CASE 2.

AN INDICTMENT upon the 8. Hen 6. c. 9. against them was discharged; for the statute was recited, that if any be of his lands and tenements expelled or disseised, or be held out with force, and faith not *manu forti*; for the words are, *manu forti* expelled or disseised. Secondly, the statute is recited, that the party grieved may have his recovery *per assisam novam assise*, whereas it is to be *disseisinæ*: and the parties had restitution.—NOTA, the record of the indictment was removed in *Michaelmas* term last.

An indictment for a forcible entry is bad if it abate the words *manu forti*. Post. 461.

Cro. Car. 135.
2. Bulf. 258.
2. Hawk. 349.
Burr. 1658. 1731.

Jerome and Avicia Uxor' against Phear and Neale.

CASE 3.

Hilary Term, 29. Eliz. Roll 515.

TRESPASS of assault and battery, and wounding of the *feme* plaintiff. The defendant pleaded, that the village of *New Sarum* was an ancient city, and that time out of mind it had been used there, that upon complaint to the mayor of a battery and affray, that he, as a justice of peace, shall send his serjeant at mace, or an officer *conus*, for the party to come before him and answer, &c. And alledgeth in *facto*, that Jerome the plaintiff had made a battery; and thereupon complaint was made to the mayor: he sent the defendants (being constables there) to attach him, and to bring him before the mayor to answer, &c. whereupon they came to him to attach him, and the *feme* plaintiff *eos impedit*; whereupon they laid their hands upon her *molliter*, to cause her to desist, that they might attach him, which is the same trespass, &c. and demand judgment *si assio*, &c. Upon this plea, it was demurred

A plea of *molliter manus* does not extend to justify battery or wounding, &c. &c. Post. 243.

Lut. 929.
3. Lev. 404.
2. Vent. 193.
Skin. 387.
Ld. Ray. 273.
12. Mod. 338.
Salk. 144.
5. Com. Dig. 355.
1. Bac. Abr. 155.

murred in law.—COKE argued for the plaintiff, and alledged, that the plea was insufficient for four causes. First, that the prescription was void, and against law. Secondly, that they came to attach him, but saith not within the city; and it may be intended in another place out of the city. Thirdly, the defendants alledge, that they did *molliter* lay their hands on her, which is the same trespass, but answer not to the battery and wounding, nor traverse it. Fourthly, they justified at *New Sarum*, but do not traverse the trespass, which was supposed in *Middlesex*. And for the first point, COKE said, it is against *Magna Charta*, and 25. *Edw. 3. c. 4. & 42. Edw. 3. c. 3.* that none shall be imprisoned, but by reason of indictment, or due process of law, and not upon complaint; and a prescription to be a justice of peace cannot be, for the authority of a justice of peace commenced by the statute of 2. *Edw. 3. c. 16.* and before that time they were only conservators of the peace: and the other matters are apparently vicious, and no defence can be made of them.—THE COURT commanded that judgment should be given for the plaintiffs, and principally for the two latter points; for they would not speak to the first, because it touched the authority of mayors, &c. But the next day they commanded judgment to be staid, and that the plaintiffs should come before them; by which it seemeth, they intended to make a composition. *Vide Cro. Jac. 664.*

CASE 4.

Nicholson against Lyne.

Words are actionable, though the fact they impute is punishable in the spiritual court only. *Sed vide Post. 502. contra.*

ACTION for words. That the plaintiff being a minister, the defendant said of him, that "he had two wives (a)," to cause him to be deprived. Upon not guilty, it was found for the plaintiff.—COKE moved in arrest of judgment, that the words were not actionable, for it is a spiritual fault; as to call one heretic, &c. But it was answered, that forasmuch as the plaintiff was a minister, this is a defamation, and cause of deprivation, if true; yet judgment was given against the plaintiff.

(a) By 1. Jac. 2. c. 11. bigamy is now felony.

CASE 5.

Pearle against Unger.

An *assumpsit* will lie where part of the consideration is executed. *Ante, 42. Post, 138.*

1. Leon. 102.
1. Com. Dig.
142.

ASSUMPSIT. And declares, that he was possessed of certain land for years: the defendant, in consideration he had occupied the land, and had paid the rent to the defendant, *viz.* thirty pounds *per annum*, all the time he had occupied it, assumed to save him harmless for the occupation of the land always during the term, as well for the years past as to come; and alledges, that before the time of the promise, *viz.* such a day, &c. his beasts were taken damage feasant, &c. and that the defendant had not saved him harmless of it: and upon not guilty, it was found for the plaintiff, and damages assessed.—GOLDING moved in arrest of judgment, that here is no consideration to maintain the action; for the consideration and cause of the promise was a thing done before, *viz.* the occupation and payment of the rent; which being past, are no considerations for a thing future to be done.—But it was adjudged for the plaintiff; for the consideration, that he was in possession, and had paid his rent, and was to pay his rent, is sufficient to cause the other to defend his possession for the time past and to come.

Richardson

Richardson against Pricket.

CASE 6.

FALSE IMPRISONMENT. The plaintiff supposed the trespass and false imprisonment to be 10. Dec. 29. Eliz. The defendant pleads, that he, by virtue of a warrant of the sheriff, &c. did arrest and imprison him, 2. & 3. die Decemb. before. *ABSQUE HOC*, that he was guilty before or after, &c.—The plaintiff said he was guilty of the trespass, &c. *after* the third day of December, *prout in narratione sua specificatur*. And upon this they were at issue; and it was found for the plaintiff. And it was said, that the issue was not well joined; for it is, that he was guilty, &c. *after* the third day, &c. but *saith not*, and *before* the action brought. But it was ruled to be well joined; for when it is said, he was guilty *after* the third day, &c. *prout*, &c. it is to be intended between the third day and the day of which he counted. And the plaintiff had judgment. Pleading.
2. Term Rep. 172.

George's Case.

CASE 7.

ACTION for words, "Thou art a couzening knave; thou hast couzened me of twenty pounds at such a place, and such a man of twenty pounds; and there is never a *George* in England but he is a couzening fellow." Upon not guilty, it was found for the plaintiff. And it was ruled, that the action lieth not; for WRAY said, they are too general to bear an action; and a man is to suffer no pain or loss for those words, if they were true. And one *Egleton's Case* was cited to be adjudged, "Thou art a couzening coroner; for thou hast couzened J. S. of his lands;" no action lieth. And WRAY said, that in a writ of error between *Warker and Middlemore*, which doth depend in the exchequer-chamber, action for these words, "Thou art a couzener, for thou hadst me to *Coventry*, and didst couzen me of eighty pounds," judgment was given for the plaintiff in the queen's bench; but it was never moved in that Court; for if it had, they would not have given judgment. *NOTA*, Trin. 30. that judgment was reversed in the exchequer-chamber. Words are not actionable, if they are so general that they would not subject the party to punishment, if true.
S. C. Moor, 261.
Post. 99. 171.
Cro. Jac. 427.
Cro. Car. 417.
2. Saund. 307.

Docton against Priest.

CASE 8.

EJECTIONE FIRMÆ. Upon special verdict it was found, that two tenants in common of a house and land made partition within the house, of the house and land, by *parol* without deed: the question was, If it were a good partition? And the opinion of the Court was, that a partition between tenants in common upon the land, is good without deed; for it amounts to a livery in law; but it is not so between jointenants, for they cannot make livery one to the other.—But WRAY, C. J. said, that a partition made by *parol* of a thing that may pass without livery, as a lease for years, is good. But in this case the partition was in the house, and not on the land, and it was not found the land was within view; and so it cannot amount to a livery in law: and for that cause it was adjudged for the defendant, that the partition was not good for the land, for which only the action was brought. Tenants in common may make partition by *parole* if accompanied by livery at the time; but a partition between joint-tenants is not good without deed.
Hargrave's Co. Lit. 169. 2. note [2.]
200 b.
Cowp. 219.
Post. 142.

Knaveſburgh's

CASE 9.

An indictment for a forcible entry reciting the statute in the *conjunctive*, is bad.
Post. 697.
1. Com. Dig. 231.

Knavesburgh's Case.

HE was indicted upon the 8. Hen. 6. c. 9. which recited the statute to be, "If any be of land or tenements *manu forti* expelled and disseised in the *conjunctive*;" whereas it ought to be in the *disjunctive*: and for this misrecital of the statute, the indictment was discharged, and a precedent was cited in *Michaelmas* term last, of the like judgment for the same.

CASE 10.

Husband and wife may join in *trespass* for entering their land, and taking 20 loads of hay *inde provenient*.
Post. 133.

2. Vent. 195.
2. Will. 424.
3. Salk. 114.
- Doughl. 323.

Tho. Cookson and Anna Uxor' against Jo. Castline.

TRESPASS for entering upon their land, *et herbam ipsorum Tho. & Annæ adtunc & ibidem crescentem messuit & succidit, & in fœnum composuit, & viginti carucatas fœni inde provenient' cepit & asportavit*. Upon not guilty pleaded, and found for the plaintiffs, it was alledged in arrest of judgment, that the action doth not lie for baron and feme of the twenty loads of hay taken, &c: for it is a chattel severed from the inheritance and vested in the baron, for which the feme shall not join with him in the action. But the clear opinion of the Court was, that they may well join; for as they may join in *trespass de clauso fracto*, and cutting their grafs; so they may join for the hay coming off it: and it was so adjudged; and the like judgment was given this term, between *Wilkes and his wife against Derby*.—But WRAY, C. J. said, if it were for taking twenty loads of hay, but say not *inde provenient'*, it is otherwise; for it may be intended of hay lying upon the land before, for which they cannot join.

CASE 11.

Harward against Furborne.

Costs given by a statute subsequent to the 6. Edw. 1. c. 1. may be recovered in the king's bench, though under 40s.
1. Will. 318.
3. Will. 48.
3. Burr. 1592.

DEBT brought here for sixteen shillings given for costs of suit in an inferior court, upon a non-suit by the 23. Hen. 8. c. 7. After verdict, GODFREY and HOUGHTON moved in arrest of judgment; for such a petty sum, action lieth not in this court against the statute of *Gloucester*; which enacts, that no action shall be brought here for any sum under forty shillings.—But THE COURT held clearly, that so farasmuch as the costs are given by a latter statute; they are recoverable by an action of debt in this court; and they gave judgment for the plaintiff.

Cowp. 367. 4. Term Rep. 73.

CASE 12.

Smith against Haws.

A devise to a son for life with remainder to his son and heirs males of his body, remainder to the right heirs of the devisor. On the death of the devisor, the son takes an estate in fee-simple as the right heir.

COVENANT. The case upon demurrer was, *William Redman*, grandfather, father and son. The grandfather was seised of land in fee, and devised it to the father for life, the remainder to the son, and the heirs males of his body, remainder to the right heirs of the devisor, and the heirs males of his body begotten. The grandfather and father die. The son dieth without issue-male, having issue *Anne*. The said *Anne* takes husband, and the husband and *Anne* sell the land to J. S. in fee, and did covenant, that they were seised of a sufficient and lawful estate in fee-simple. And if this was an estate in tail, or a fee-simple in *Anne*, who was the heir of the devisor, was the question?

Swinb. 180. 1. Term Rep. 630.

GODFREY

GODFREY argued that it was an estate tail; for his intent was apparent that his right heir should have an estate tail; and it is here as fully limited as if he had expressly limited and appointed that he should have an estate tail; and his intent being so, the law will construe an estate tail, his intent not being against law; and cited *Huffey's Case*, 3^d. Hen. 8. Bro. & 9. Hen. 6. pl. 25. by *Passon*.

SMITH
against
HAWES.

COKE *contra*. It is a fee-simple; for immediately by the death of the grandfather, the remainder doth vest in the father, as his right heir, and vesteth in him as fee-simple, and cannot by matter subsequent be converted into an estate in tail. And so it was adjudged.

1. Cr. 24.

Cole's Case.

CASE 13.

In the Common Pleas.

ASSUMPSIT. And declared, that whereas the defendant was indebted to J. S. in twenty pounds, in consideration that the plaintiff at the defendant's request agreed to give his bond to J. S. for the said debt, the defendant did assume to save him harmless; and alledged in fact, that he did give his bond, &c. and he was sued upon it, &c. Upon *non assumpsit*, it was found for the plaintiff.

Pleading in
assumpsit.

SHUTTLEWORTH moved that the plaintiff had not well declared, for that it is not alledged that he gave notice that he had made the bond, and was sued upon it. But it was adjudged for the plaintiff; for the defendant at his peril ought to take notice of the obligation, &c. as in a bond to stand to award, he is to take notice of it.

ANDERSON, *Chief Justice*, said, if one be obliged to make such assurance as J. S. shall advise, he ought to take notice of the assurance devised at his peril, because a certain person is appointed to do it. But if it be such assurance as my counsel shall advise, I ought to give notice of the assurance; for he cannot take notice who is my counsel. And for the other point, he ought to save him harmless without request, *viz.* by payment of the money, or, &c.

Ante, 9.

Edward Seymour against Sir Jo. Clifton.

CASE 14.

In the Exchequer Chamber.

ERROR. The error assigned was, For that the issue was joined, *Prædictus* omitted that "Jo. Clifton *hoc petit quod inquiratur per patriam, et Edwardus Seymour similiter*," but saith not "*prædictus*." But inasmuch as there was no other Edward named in the record but the defendant, and so cannot be intended another person, and the word "*prædictus*" is but of form, and not of substance, it is void by the statute, and may be amended; and the word "*prædictus*" was put in, and the judgment was affirmed.

Prædictus omitted in entering
the similiter.
Gouldf. 89.

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H

Stranham's

CASE 15.

Stranham's Case,

In trover, the conversion is the *tert* which is the substance of the action, and therefore traversable.

Post. 201. 377.
Ante, 78.

10. Co. 56. b.
Gouldf. 89.
Yelv. 166.
Crg. Car. 262.

COKE said, it was adjudged in action of trover and conversion, that the conversion is traversable; for it is the substance of the action, and the *tert* supposed in him, and so may well be traversed; for if one finds goods, but doth not convert them, no action lieth; as the case was in a trover and conversion of goods, the defendant saith he took them *damage feasant*, and impounded them, *ABSQUE HOC* that he converted them to his use. And in *Leake's Case* it was adjudged that the place and time of the conversion are to be alledged, for they are material; and for that they were not alledged, the bill was abated after verdict (a),

1. Brownl. 8. 5. Com. Dig. 30. 118. 2. Term Rep. 756.

(a) Sed vide 16. & 17. Car. 2. c. 8.

CASE 16.

Coke against Barrows,

Assumpsit.

Cowper, 290.
294.
1. Term Rep.
21. 62.

ERROR. For that the plaintiff in *assumpsit* declared, that whereas he was indebted to J. S. in forty shillings, the defendant, in consideration he had delivered forty shillings to him, did assume to pay it, and to discharge him against J. S. and alledgeth that he had not discharged him, but suffered him to be sued for the forty shillings by H. C. executor of J. S. but doth not alledge that J. S. was dead.

BUT THE COURT held it good enough; for the plaintiff had directly alledged that he had not discharged him; and the other matter is but circumstance; and the judgment was affirmed,

30. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*

Sir Francis Gawdy, *Knt.*

John Clench, *Esq.*

Robert Schute, *Esq.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

} *Justices.*

Inglebath *against* Jones.

CASE 1.

Int. Hilary Term, 30. Eliz. Roll 500.

ACTION for words: "Thou art a bankrupt knave, and a pocky knave, and let them bear witness that stand by, and I will prove it." The defendant pleaded that he spake the words at *D. in Essex*, and that at such a place, &c. he had made an accord with the plaintiff for all trespasses, actions and debates in every place (except in *London*), and had given him satisfaction for them, *ABSQUE HOC* that he spoke these words in *London*. The plaintiff replied, that he spake the words in *London prout, &c. ABSQUE HOC* that he made such an accord *prout, &c.* Upon this it was demurred in law; for it was said the plaintiff must maintain his declaration, and is not to traverse that which was but an inducement to the traverse.—*GLANVILLE*. The traverse taken in the replication is good; for the place where the words are spoken is not material; but when the defendant by his plea hath made the place of speaking material, there the plaintiff hath election to maintain his declaration, and that the words were spoken there, and join issue upon it; or may by general words maintain his declaration, and traverse that which is falsely alledged to take from him his action; and he is to be received to which of the pleas he pleaseth; and cited 32. *Edw. 3. pl. 23. 46. Edw. 3. pl. 30. 10. Edw. 4. pl. 2.* And afterwards it was adjudged for the plaintiff.

In an action for words, if the place where is made material by the defendant's plea, the plaintiff may at his election traverse the place and join issue upon it; or may, by general words, maintain his declaration. Post. 153. 407. 418. 667. 716. 842. 868. Co. Lit. 282. b. 1. Saund. 22. Moor, 429. Stra. 118. Ld. Ray. 121. 370.

Engurft *against* Browne.

CASE 2.

ACTION for these words: "Thou wert a suitor to a woman in *Southwark*, and didst couzen her of her goods, and procured certain false witnesses to be forged." After verdict it was alledged by *DANIEL* in arrest of judgment, that the words are not actionable; for the first words, "Thou didst couzen, &c." have been lately adjudged not actionable. And for the last words there is less doubt; for it appeareth not what their testimony doth concern, nor that the forgery of it is to any purpose; for it may be of some small matter.—And the Court commanded judgment to be stayed; for *WRAY* said, they are *petit parols* to maintain an action.

Judgment in slander stayed, because the words were *petit parols*. Ante 93. 95. 1. T. Rep. 110.

A devise of lands not written by the devisor, or by his consent, is void.

Keilw. 209.

And. 34.

3. Lev. 1.

1. Bl. Rep. 9.

2. Bl. Com. 376.

Sid. 362.

2. Keb. 345.

1. Leon. 113.

3. Rep. 31.

Gilbert on

Wills, 375.

Gilb. on Dev.

85.

Powel Devi.

27.

Cowp. 49.

EJECTIONE FIRMAE. And declared upon a lease made to him by five women, daughters and heirs of *Jo. Dover*. Upon not guilty, the jury gave a special verdict:—"The said *Dover* was seised in fee of the land held in socage, and that he declared to *William North* and others his will to be, that *J. C.* lessor of the defendant should have his land; and the said *William North* recited the words to him, and asked him if this was and should be his will; and he answered, that it was. And they further find that the said *North*, in the life of *Dover*, and for his own remembrance, and without the appointment of *Dover*, writ the said will, and afterwards *Dover* died." And if this were a good will, being spoken with such direct words, and being writ in his life by the witness for his own remembrance, and without the appointment of *Dover*? was the question.—All the Justices (who shewed their opinions *seriatim*) held it to be a void devise, because the will was not writ by the commandment of the devisor, or by his consent, but of the person present, of his own head; but if he had writ it without the devisor's consent, and afterwards had read it to him, and he had agreed to it, this had been as good as if written by his appointment, as *Brown's Case*, *Dyer* 72. And if in the principal case it should be a good will, it would be a great mischief; for then if one should say to another when he is in health, "I devise such land to *J. S.*" and he afterwards writeth it in the life of the party, but he never hears of it afterwards nor agreeth to it; if this should be a good will, it were not reasonable; for perhaps he had afterwards altered his intention. And judgment was given accordingly.

NOTA. *ROBERT SNAGG*, who argued in this case, said it was ruled in chancery in *Sir Richard Pexall's Case*, when he devised certain land to his wife for life, and commanded it to be written, and it was written, and a proviso added by the writer, that if she married that the devise should be void; and this being read to him, he said the proviso was no part of his will, but for the residue it should stand; and he died before the will was altered, and the proviso was adjudged to be void, and the rest of his will did stand good.

And now by 29. Car. 2. c. 3. all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction; and be subscribed in his presence, by three or four credible witnesses.

An information on 21. Hen. 8. c. 13. s. 26. is bad if it says *absentavit* on a thing *voluntarie*. Cowp. 321. (a) The defendant is intitled to a writ on a *nonuit* Cowp. 366.

INFORMATION for the queen and himself against the defendant (a), vicar of the church of *Engliscombe* in com' *Somerset*, for that *absentavit se*, and had not been resident by the space of a whole month together. After verdict *WALMSLEY* moved in arrest of judgment, that the information was insufficient; for the statute is, if he absents himself *voluntarie*, which is not alledged; for if he be absent by compulsion or restraint, it is out of the statute. And of that opinion was the whole Court, that the word *voluntarie* is of force, and must be in of necessity.

Morgan's.

Morgan's Case.

CASE 5.

ERROR to reverse an outlawry upon an attainder of *The Morgan* his father, whose son and heir he is, who was attainted and hanged for the murder of one *Turberville*.—**COKE** assigned the error in the indictment, for that the said *Thomas Morgan* was indicted in the county of *Somerset*, that whereas the said *Thomas Morgan nuper de D. in com. Dorset gen. apud W. in comitat' prædict'* such a day did strike and kill the said *Turberville*; and the exception was, the stroke and death was at *W. in com. prædict'*; and that shall be intended in *com' Dorset* which was last mentioned, and then the indictment in *com' Somerset* is merely void; for "*Somerset*" is not named in the body of the indictment, but in the margin. And of that opinion was the Court; but they would respite the giving of judgment until the Attorney General was acquainted with it. *Vide* 18. *Edw. 2. "Brief"* 828.

In an indictment i: the fact be recited in the county aforesaid, and this relative refers to a different county than that in the margin, the attainder shall be reversed. *Roll. 184. 333. 436. 606. 656. 658. 739.*
Co. Lit. 22. b.
2. Hawk. 314.
Cowp. 682.

Marshal against Hobson.

CASE 6.

ERROR of a judgment after verdict in the city of *Tork*. Two errors assigned.—First, the plaintiff brought a *formedon by bill*, and declared there according to the custom, and for that the land was freehold, which is not recoverable but *by writ* in any court, therefore being *by bill* it was erroneous. And **GODFREY** said, in any court where land is to be recovered, he shall have a *writ close* or any other writ, and shall declare according to his case and the nature of the suit, *Fitz. Nat. Br. f. 26. Hen. 6. "Error"* 28. 14. *Hen. 4. pl. 34*.—Second error. The judgment was, that the defendant *eat sine die*; whereas it ought to be, that the plaintiff shall take nothing by his bill.—And it was held an apparent error; for such judgment shall not be given but where the queen is plaintiff, against whom no judgment shall be given; or where the judgment is final, that the defendant shall hold it *a tous jours*.

judgment in *formedon* reversed, because the suit was by *bill*; and the judgment *eat sine die*.
Co. Lit. 363. a.

Pell against Pell.

CASE 7.

DEBT upon an obligation of an hundred marks. The condition was, If he pay fifty pounds the bond shall be void. The defendant pleads tender at the day, and none was there to receive it; and upon this they were at issue. Afterward the defendant pleads that *puis le darraine continuance* this hundred marks were attached in his hands in *London*, at the suit of, &c.—**GAWDY, serjeant**, said the plea was not good; for an attachment cannot be pending a suit in this court; also he pleads, the fifty pounds was tendered, and so the hundred marks were not due, and the attachment cannot be of the hundred marks; and this is no such plea as can be pleaded *puis le darraine continuance*, for this ariseth by the defendant's own act, and may be intended to be by *covin*.—**THE COURT** was in doubt for the first point, and commanded that the precedents be searched, if any such attachment had been allowed pending a suit here, or in the common pleas; but they held, that the attachment of the hundred marks (if attachable) was well enough, for it is always to be demanded in that manner, and it is according to the obligation. And to the third, they held it may be well pleaded *puis le darraine continuance*, for it goeth in bar at another day.

An attachment shall be of the penalty of a bond, but judgment shall be for the principal only; and such attachment may be pleaded *puis le darraine continuance*; but if a suit be for the debt in a superior court, it cannot be attached.
1. Sid. 327.
1. Roll. Ab. 552.
3. Leon. 210.
1. Bac. Abr. 697.
2. Term Rep. 388.
Post. 157.

PELL
against
PELL.

DALTON shewed a precedent in the common pleas, *Mich.* 12. & 13. *Eliz.* 164. Such attachment was made pending the suit and after the last continuance. But afterwards the parties compounded.

CASE 8.

Lacy against Smith.

In trover as administrator it need not be shewn that the person who granted the administration was ordinary. Ante, 6. Post. 431.

1. Salk. 40.

ACTION *sur trover*. And declareth as administrator to J. S. and that administration was granted to him by A. B. official to the bishop of *Peterborough*, and sheweth not that he was ordinary of the place, or that the granting of administration did belong to him; and this matter after verdict was alledged in arrest of judgment. But because divers precedents were so, and that such declarations had been allowed, the Court did give judgment for the plaintiff.

Cowper, 140.

CASE 9.

Stubbs against Rightwile.

Trinity Term, 28. *Eliz.* Roll 407.

An executor *de seu tort* cannot plead in abatement that he is administrator and not executor. Post. 432. 555. 565. 810.

Hob. 49.

1. Lut. 27.

5. Co. 34.

2. Brownl. 183.

Stiles, 337.

3. Co. 52.

Went. c. 14.

Salk. 313.

Ld. Raym. 63.

2. Bac. Abr. 389.

371.

5. Com. Dig.

201, 202.

2. Ld. Raym.

1207.

1. Will. 258.

2. Term Rep.

97. 587. 597.

Post. 406.

DEBT against the defendant as executor of J. S. He pleads that he had taken letters of administration. Judgment of the writ, &c. The plaintiff replieth, that the defendant administered *de seu tort*, and after took letters of administration, judgment, &c. Upon this it was demurred.—GODFREY, for the defendant, argued, that now the name of executor is lawfully changed before the action brought, and therefore is to be sued by his new name as administrator, 9. *Edw.* 4. pl. 33. 21. *Hen.* 6. pl. 5. 18. *Hen.* 6. pl. 29. 13. *Hen.* 4. "Executors" 118.—COKE contra. For when by his tortious administration he hath given advantage to be sued as executor, he cannot by his own act purge this *tort*, and cause the plaintiff to sue him by another name; but the plaintiff hath election to sue him one way or other, for he shall take no advantage of his own *tort*. As if one in execution escapes, and is taken again by the gaoler, he shall not have an *audita querela*. And it will be a mischief if the plaintiff shall be compelled to sue him as administrator, for it may be that whilst he administered of his own wrong, he wasted the goods; and if he be only sued as administrator, he shall only be charged of the goods that came to his hands since administration, 12. *Rich.* 2. "Administrators" 21. And it was afterwards adjudged that the writ was good, and that the defendant *respondra ouster*.—NOTA. If judgment be given against an executor upon demurrer, and execution be awarded, the sheriff cannot return *nulla habet bona testatoris*, but is to return a *devastavit*, as if it had been found against the executor by verdict; for PER CURIAM he hath charged himself by his own plea.

CASE 10.

Melwich against Luther & Uxorem.

Hilary Term, 30. *Eliz.* Roll 344.

If the lord of a manor grants the inheritance of all the copyholds within his manor whereby they are severed, yet the custom remains, and the grantee shall hold customary courts, the surrenders, make and grant by copy.—Ante 38. Post. 150. 210. 299. 325. 522. Sed *quæritur*. Vide infra & Post. 443. S. C. 4. Co. 26. Cro. Jac. 573. 2. Co. 17. a. 3. Co. 64. a. Hob. 181. 4. Co. 60. 2. Mo. Abr. 510. 527. Gilb. Ten. 211. 217. 251. 319.

EJECTIONE FIRMÆ. And declareth of a lease made to him by Jo. Melwich for twenty-one years of three messuages and one cottage in *Eastworth*. Upon not guilty pleaded, a special verdict was given, that the tenements of which the ejectionment was

sup-

MELWICH
against
LU-MER &
UNORAM.

supposed, and divers other tenements in *Eastworth* aforesaid, were time out of mind, &c. until 1st Jan. 37. Hen. 8. parcel of the manor of *Boveridge*, in the county of *Dorset*, of which manor king Hen. 8. was seised in fee; and that the tenements of which, &c. and the other tenements in *Eastworth* were parcel of the customary tenements of the said manor, and demised and demisable by copy of court-roll, by the lord or his steward, to any person for life or lives, in possession or reversion, at the will of the lord, according to the custom of the said manor; and at the same time one *Alice Melwich*, widow, was a copyholder of the tenements of which, &c. for her life; and that upon the said first day of January, 37. H. 8. the said king by his letters patents did grant to *Jo. Ogden, Esq.* the tenements of which, &c. and the other tenements in *Eastworth*. And find further, that the said *Jo. Ogden* at the same time was seised of a manor called *Harbridge*, in the county of *Southampton*; and being so seised of the said manor of *Harbridge*, and of the tenements of which, &c. and of the other tenements in *Eastworth*, at the court of his manor of *Harbridge* held 12. Junii, 7. Edw. 6. did grant by copy the tenements of which, &c. to one *Ro. Melwich*, and to the said *Jo. Melwich*, to have for their lives successively after the death of the said *Alice*, according to the custom, &c. and that this grant was upon the surrender of *Henry Dowling* and *Rich. Dowling*, of a copy in reversion of the said tenements, and they were admitted tenants in reversion. And find that *Alice* died, and after *Ro. Melwich* entered and died, and that the said *Jo. Ogden* enfeoffed of the said tenements of which, &c. one *Morgan Polden*, who thereof enfeoffed *William Constantine*; and after the said *Jo. Melwich* entered and made a lease to the plaintiff: and the defendants, as servants to the said *William Constantine*, and by his command, ejected him; and *si super totam materiam, &c.*

The case was argued this term by *HARRIS* for the plaintiff, and by *EWENS* for the defendant; and it was afterwards adjudged for the plaintiff. For the Justices said, although the tenements are divided from the residue of the manor, yet the custom remaineth, and they continue copyholders paying their services and duties, &c. And he which hath the freehold of them may keep a court in any place; and it is not properly a court baron, but as a court of survey, at which copyholds may be well granted, and the lord or his steward may grant copies out of court as well as in court, 2. Edw. 6. *Brooks*. And a surrender being taken, and a new copy granted, is good in whatsoever place it be done. And it was said, if the copyholders die, yet he which hath the freehold may grant them by copy again; and that it was so held in the lord chancellor *Hatton's Case*: and if they be copyholders of inheritance, they may compel him that hath the freehold to accept surrenders and make new admittances, &c. (a) *NOTA*, here nothing was spoken of the lease for years, if it were a forfeiture or not, no custom being found to maintain it.

NOTA. A writ of error was brought of this judgment in the exchequer-chamber, and the error assigned in the matter of law, but no judgment given; for the parties compounded, and agreed with the plaintiff in the writ of error, and he had the land, as *Ewens* who was of his counsel told me. For he said that all the Justices and Barons in the exchequer-chamber did hold clearly,

(a) Cro. Eliz.
39. 394. 443.
662.

4. Co. 26.
Co. Lit. 58. a.
1. Mod. 171.
Cro. Jac. 582.
4. Inst. 266.
1. Roll. Abr.
527.
Ld. Ray. 658.
Comb. 84.
12. Mod. 465.
1. Bac. Abr. 476.

MELWICH
against
LUTHER &
UKOREM.

(b) See the conclusion of the case of Bright v. Frost, Post. 443.

that it was a void grant by copy; for being divided from the manor, the custom to demise them is altogether gone and destroyed, so as the estates for life which were *in esse* at the time of the alienation of the freehold of them and severance of them, being now determined by surrender, or otherwise, no new copy can be made: yet the alienation of the freehold of them doth not destroy the estates of the copyholders then *in esse*, but they shall hold them during their estates, paying their services, but no new estates may be afterward granted by copy (b).

CASE 11.

Cæsar against Stone.

The exigent must mention where the sheriff is to bring the body.

ERROR to reverse an outlawry. The error assigned was, that in the writ of exigent no place was mentioned where the sheriff was to have the body; so that the sheriff cannot know into what court to bring the body. And for this cause the judgment was reversed. 33. Edw. 3. "Brief" 918. 27. Hen. 6. pl. 2.

CASE 12.

Peterfon's Case.

A defendant cannot take advantage of his own mispleading.

DEBT upon a bond. The defendant pleaded the statute of usury in bar, that there was an agreement between the plaintiff and him, that the plaintiff should deliver to him wares of the value of twenty pounds, and that the defendant should pay for the same within six months thirty-four pounds; upon which they were at issue, and found against the defendant.

DANIEL moved in arrest of judgment, that it not being alledged that the obligation was made for the payment of this money, it was no plea or issue.—*Sed non allocatur*; for he shall not take advantage of his own mispleading: and judgment was given for the plaintiff.

CASE 13.

William Griffith against Ro. Apprice.

Error lies in the king's bench on judgment in ejectment at the grand session in Wales.

Post. 826.

5. Co. 105.
Moor, 248.

(a) 2. Inst. 200.
Bro. Par. 70.
Co. Lit. 64.
Plowd. 206.
2. T. Rep. 87.

ERROR of a judgment in *ejectione firmæ* in the county of Denbigh, before the Justices there. The error was apparent; for the writ did bear date 16. April, 28. Eliz. and the ejectment was supposed 27. Aprilis, 28. Eliz. and so cannot be defended. But WINTER said, that by the 35. Hen. 8. c. 26. f. 113. judgments given in personal actions in Wales shall be reversed there, and this is a personal action.—EGERTON, *Solicitor, contra*. For this action doth sound in the realty, and the statute did not intend that titles should come in question before the counsel of the Marches; and the statute is in the affirmative, and therefore doth not take away the power at the common law; and although he may sue there by the statute, yet he may sue here if he will, as he might before (a).—Afterwards it was adjudged that this Court had jurisdiction, and the judgment was reversed.

CASE 14.

Elred against Wafs.

Outlawry reversed for the variance of a letter in the process; and because the *alias capias* was returned by the sheriff when out of office.—Ante 56. 85.—Post. 105. 257.

ERROR to reverse an outlawry in debt. COKE assigned the errors.—First, The defendant in the original was named *Elred* according to his true name, and in the mean process, *viz.* the *capias*, he was named *Eldred*, and so is erroneous; for if there be

any difference by omission, addition, or interposition of any letter between the original and judicial process, it is erroneous. In *Tr. 26. Eliz.* outlawry reversed upon a difference, viz. *Wakwyn and Wakweyn*: 2. *Rich. 3. pl. 13. Sein-John & Saint-John*: so in *Fisher's case, York for Yerk*.—Second error, which was error in fact, that the *alias capias* was returned by one *Felton*, whereas he was then removed from his office, and *Townsend* was sheriff; to which they had pleaded *in nullo est erratum*, and so the Court shall intend it to be true; and this he said was a dead fault.—And for these errors the judgment was reversed.

ELRID
against
WASS.

New's Case.

CASE 15.

ERROR upon a judgment given in debt on bond, in the court of *Havering*, in *Essex*. The condition of the obligation was for the payment of 20l. to the plaintiff at his house at *S. in Kent*. The defendant pleaded "payment at the day," *secundum formam & effectum indorsamenti prædicti*. The error assigned was, that the issue was tried at *Havering*, and not at *S. in Kent*.

Where issuable matter is alledged, and no place mentioned, it shall be tried where the action is brought.

But it was said, that this is no error; for when a thing issuable is alledged, and no place, this shall be tried where the action is brought; and the words *secundum formam, &c.* refer only to the time, and not to the place; for the place is not material, payment being made to the obligee himself: and it doth not appear, but *S. in Kent* may be within the jurisdiction of *Havering*; for it is not said in the county of *Kent*, but at *S. in Kent*; and there may be such a place called *Kent* in *Havering*.—Afterwards *Mich. 30. & 31. Eliz.* the judgment was affirmed.

1. T. Rep. 151.

Leat against Jenning.

CASE 16.

ERROR of a judgment in an inferior court. The error assigned was, that the distress was awarded returnable at the next court, after the serving of the process; and every return is to be at a day certain; and it may be the process shall not be served within a year, and the defendant is to have day at every court, otherwise the process is discontinued, 9. *Eliz. Dyer, 262*.—Afterwards for this cause the judgment was reversed.

Every return must be at a day certain.
2. Cro. 314.
1. Mod. 81.
1. Vent. 181.
Rayn. 204.
1. Roll. Ab. 484.
Cowper, 178.

Dinflow's Case.

CASE 17.

HE was indicted upon the 5. *Eliz. c. 9*, for perjury; and the indictment was, that *tacito per se sacro Evangelio falso deposuit*; but it was not directly alledged that he was sworn, and the indictment was discharged; for the Justices said, when such a heinous crime is objected against one, it ought to be fully alledged, otherwise it is not good,

An indictment for perjury must directly alledge that the defendant was sworn.
1. Hawk. P. C. c. 67. s. 17.
1. T. Rep. 69.

3. Bac. Abr. 817, Dougl. 156.

George Lovegrove against Inocke.

CASE 18.

PROHIBITION The suit in the spiritual court was against the plaintiff by the name of *Gregory Lovegrove*, as appeareth by the libel, which (in truth) was a wrong name; yet for this variance between the prohibition and the libel, the prohibition was abated.

A variance between the libel and prohibition in the christian name, is fatal.
Ante 104.

Cowp. 178. 1. T. Rep. 237.

CASE 19.

Meggot against Broughton.

The king's bench, on error, may reverse its own judgment signed against two, where one dies between the *nisi prius* and day in bank.

Ld. Raym. 151.
2. T. Rep. 637.

ERROR upon a judgment given in this court this term. The error assigned was, that in an *assumpsit* against two, mean between the verdict and the judgment, one of them dies, and notwithstanding judgment was given. Upon this it was demurred, if error lieth here; for it was said, that this Court cannot reverse their own judgment, except it be for error in process, and not for error in *fact*. But it was said on the other part, that in *Gourney's Case*, where an infant appeared by attorney, whereas he was to appear by guardian, and recovery was had, and error brought here, and for this error in *fact* judgment was reversed.—And it was afterwards adjudged, that the writ of error was well brought here; for the death, &c. was by the act of God, and a thing that did not lie in their cognizance: and it was clearly agreed, that the death of one of the parties did abate the writ; and the judgment was reversed.

CASE 20.

Foster against Walter.

A devise to a corporation is good, though it is not by their corporate name.

S. C. 2. Leon.
165.
10. Co. 125. a.
Plow. 345.
Dalif. 78.
Owen, 35.
10. Rep. 57.

EJECTIONE FIRMÆ. The case was, *Richard Wager*, 6. *Edw.* 6. did devise a messuage to *A.* his wife for life, remainder to his son in tail; and if he dieth without issue, or be unthrifty, that it shall remain to the master and wardens of the mystery of cordwainers, *London*; whereas they were incorporated by the name of master warden and commonalty, &c. The question was, If by reason of this *misnomer* of the corporation, the devise was void? And it was argued by *DANIEL* that it was, and by *COOPER contra*.

THE JUSTICES held the devise good; for by intendment the deviser had not counsel there, nor had cognizance of their name; and being known usually by that name, there is a sufficient intendment what corporation he doth intend shall have it.

CASE 21.

East and Wilson.

A statute recited to be made at *Westminster* must shew the county in which it lies. See vide *Dyer*, 203. 2. *Hawk.* 351.

THEY were indicted upon the 8. *Hen.* 6. c. 9. for forcible entries; and the statute was recited to be made at *Westminster*, but shewed not in what county; and the indictment was discharged.

Michaelmas Term,

30. and 31. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*

Sir Francis Gawdy, *Knt.*

John Clench, *Esq.*

Robert Schute, *Esq.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

} *Justices.*

Scovel against Cabell.

CASE 1.

THE case was argued by COKE for the plaintiff, and GAWDY, *See the commencement of this case, ante 89.* *serjeant, for the defendant.*—COKE argued, that by the premises the parties to whom, and the land demised, being expressed, and in the *habendum* the estate being limited, as the office of the *habendum* is, the PROVISIO that cometh afterwards shall not avoid it; for it is repugnant and void: as 21. *Hen. 7.* lease for two years, PROVISIO he shall not occupy it for one year, is void: 6. *Rich. 2.* “*Quid juris clamat*” 20. Lease for years, PROVISIO he shall not take the profits. And in this case, the lessor was tenant in tail, and he maketh this lease, as by law he may; and he cannot make it to have to one for life, the remainder to another for life, &c. And to make construction that it shall be to one for life, the remainder to another for life, will destroy the lease. —And afterwards it was adjudged for the plaintiff, that it is a joint estate, and the PROVISIO shall not sever it.

Bellicote against Taylboys.

CASE 2.

ERROR of a judgment in the court of *Bar. Plable.* The error assigned was, that the plaintiff counts, that he and the defendant did account together of divers reckonings, and he was found in arrearages 10 l. 2 s. 3 d. which he assumed to pay. Upon *non assumpsit* it was found, that he assumed to pay so much as he was found in arrearages of account, which was 7 l. 2 s. 3 d. and that he assumed to pay so much as was contained in such a bill, in which he was indebted to him, which did amount to 3 l. so all that he assumed to pay was 10 l. 2 s. 3 d. and the plaintiff had judgment. A writ of error was brought, and this error was assigned; but the Court delivered no opinion.

But for another manifest error in the record, viz. the judgment was “*capitur*” where it ought to have been “*in misericordia*,” the judgment was reversed (a).

(a) See vld
Bricket note (a) page 24.

CASE 3.

Bricket's Case.

Matter which may be rejected as surplusage shall not vitiate an indictment.

5. Co. 121. a.
1. Hale, 169.
2. Hawk. 314.
Doug. 4. 667.
1. Salk. 328.
1. Ter. Rep. 320.

A venue laid in a parish, held good.

Post. 117.

THE Indictment was, That *R. Bricket* and the others, &c. *coram* *J. S. et J. D. duo iudiciarius dominæ reginæ, &c.* and that the exception was, that it should be *duobus*, and as it is, it is false *Latin*, and without sense; and if it be not false *Latin*, this cannot be referred to those named before, which are named in the ablative case.—But THE COURT held it well enough; for the indictment shall not be overthrown for false *Latin*, if by any intendment it can be good; and although here is false *Latin*, yet it may be well enough intended in the meaning.

Second exception. *Bricket* and the others are named of *Nuneaton* in the county of *Warwick*, and the indictment being for riot, that they assembled themselves at *Artleborough*, in the parish of *Nuneaton* aforesaid, and saith not in what county *Artleborough* is; for it was said, that *Artleborough* may be in the parish of *Nuneaton*; and yet in another county.—But THE COURT held it well enough; for it appeareth not that *Artleborough* is a town, but it may be a place known by such a name in the parish of *Nuneaton*; and being named in the parish of *Nuneaton*, it shall be intended to be in the same county.

CASE 4.

Trussell against Aston.

Leave given to compound on 23. Hen. 6. c. 9. because the statute was misrecited.

Doug. 94. 97.
2. Term Rep. 569.

DEBT upon obligation. The defendant pleaded the 23. Hen. 6. c. 9. and would avoid the obligation, that he being in execution, and the plaintiff being under-sheriff, he took this bond, and let him at large. It was demurred in law, because the defendant misrecited the statute, in that he did recite, that if any sheriff, *aut ejus officarii*, where it should be *alii officarii*. And the statute speaketh not only of the sheriff and his ministers, but of other officers.—COKE said, so is the parliament roll; and so it was adjudged in one *Herris' Case*.—And of this opinion was THE COURT; but they gave day to the parties to compound, and in the mean time should stay judgment.

CASE 5.

Rofs against Morris.

Easter Term, 30. Eliz. Roll 196.

A devise to *A.* for life, with remainder *ad usum rectorum hæredum in perpetuum, secundum antiquas evidencias inde factas*, where there were several different evidences, and it was uncertain which was intended, creates a FEE SIMPLE; for it shall be taken to be the intention of the deviser, that the estate shall go to his heirs generally, according to the rules of Law. S. C. 2. Leon. 23. 3. Com. Dig. 220.

REPLEVIN. The defendant avows as servant to *Jerom Weston, Esq.* The case upon demurrer was, One *Gomerly* was seised of the manor of *Nayland*, and by deed 25. Edw. 3. gave it to Lord *Henry Scrope*, and to the heirs of his body, who died seised, and so continued by divers discents until 4. Hen. 7. and then *Thomas Lord Scrope* suffered a common recovery, which was to the use of him and his heirs, and retakes an estate of the feoffees to him and his heirs; and having issue *Ralph* and *Jeffery*, and three daughters, dieth. *Ralph* maketh a feoffment to the use of himself and his heirs, and 7. Hen. 8. deviseth it to *Jeffery* for life, and after *ad usum rectorum hæredum in perpetuum, secundum antiquas evidencias inde factas*, and died seised of this use, and of the use in divers other manors in fee. *Sir William Danby* marrieth with one of the daughters, and afterwards *Jeffery* dieth without issue. *Sir William Danby*

Ross
against
Morris.

and his wife, and the other sisters (being also married) being seised of these uses, make partition, and allot the use of this manor to Sir William Danby and his wife, and the heirs of the wife; and the other uses of the other manors to the other two daughters. Sir William Danby and his wife die. Sir Thomas Danby their heir enters, and infeofed Weston.

Upon this case the points were two.—First, If it was an estate in tail, or fee in the daughters, who were sisters to the deviser, and issues of the body of Thomas, father of the deviser?—Secondly, If this partition be void or voidable?

GODFREY, COKE, and COOPER, argued for the plaintiff, that it was an estate in fee in Jeffery, and so in the daughters; for the words of the will being "*ad usum rectorum hæredum secundum antiquas evidencias inde præ-antea fait*," it is incertain what evidences he intends; for three evidences were mentioned, viz. 1. the estate in tail, 25. Edw. 3. 2. the recovery; 3. the deed of feoffment; and it appeareth not which of them he intendeth. Also it appeareth not, whether he intended the heirs of Lord Scrope, or the heirs of Gomerly; for by the first evidence, the remainder is limited to the right heirs of Gomerly; and for this incertainty all was void. But admitting it shall be construed an estate in tail, according to the evidence of 25. Edw. 3. yet it is only an estate in tail in Jeffery, for he is the first person that takes it, and hath it as a purchaser; and when he dieth without issue the estate tail is spent, and none can have it as heir to him.—The second point, they held the partition utterly void; for it being of one use in tail, and another use in fee, and so not equal, and being made between husbands and wives, is void.

JOHNSON, ATKINSON, and EGERTON, Solicitor, contra. The will is certain enough, and the ancient evidence can be construed only of that of 25. Edw. 3. for the other are but new evidences; and it is helped by the averment, that Lord Scrope had no other ancient evidences of this land; therefore the will shall refer to it, and shall not be expounded to another sense than as the estate is there limited: and then, though the first effect and essence vesteth in Jeffery, yet he taking it by limitation, he taketh it as heir of the body of Lord Scrope, and this *per formam doni*, and then the daughters shall have it so likewise; for they all claim by one gift.—Secondly, They held the partition good; for there was *quid pro quo*, and so only voidable.

But all the Justices resolved to give judgment for the plaintiff (lessee of Weston), that this is no estate tail, but a fee-simple in the daughters; for no estate is created by the will, for the incertainty of the persons and evidences also, and the intent is to be taken in will. And THE COURT held, that his intent was, that it should go to his heirs generally, according to the course of the common law; for divers evidences are shewn in the pleading; and it is hard for a man in extremity to remember them, especially that which was made 25. Edw. 3.—But for the second matter, if it be an estate tail; if it shall inure to the daughters, as 2. Edw. 3. pl. 1. or be extinct upon the death of Jeffery without issue, who was the first (a) Dyer, 156. See also Co. Lit. 120. Cro. Car. 24. 1. Mod. 226. 2. Mod. 207.

Clearywalk

CASE 6.

Clearywalk against Constable.

A prescription to seize all goods bought and sold between aliens, in a particular place, must alledge the intent of the seizure; as for forfeiture, toll, custom, &c.

Post. 352.

1. Saund. 312.
Cowp. 47.

TRESPASS, for taking of twenty-seven pounds of white wool at his house in *St. John's Green*, in *Colchester*. The defendant pleaded, that the town of *Colchester* is an ancient borough, and within the said borough there is, and time out of mind, &c. there hath been a custom, that it shall be lawful to any burghers of the said borough to seize all goods bought and sold within the said borough to any alien by an alien to the use of the queen; and such burghers that finds and seizeth them, and alledgeth, that at the time, &c. he was a burghers there, &c. and that before the time of taking, &c. the plaintiff being an alien, bought the said twenty-seven pounds of wool of *J. L.* another alien; and the plaintiff being then a burghers, seized the said wool, as things forfeited to the use of the queen, and to his own use; and demands judgment *si actio*, &c. And upon this a demurrer in law.--**WHITE**, for the plaintiff, said that the plea was not good; for the prescription was not well alledged, that it should be lawful; and doth not alledge a use *in facto* to seize; for there can be no prescription or use, except sometimes it is put in use, 38. *Hen. 6. pl. 16. b.* 34. *Hen. 6. pl. 15. 4. & 5. Phil. & Mar. Dyer*, 152. *Hunt's Case*.—2. He prescribeth to seize the goods, &c. but alledgeth not to what use or purpose; as for forfeiture, toll, or custom, or some other intent, 37. *Hen. 6. pl. 7. 21. Hen. 7. pl. 16. 8. Rich. 2. "Grants"* 105. The cause ought always to be shewn of the seizure.—And for this cause principally **THE COURT** was clearly of opinion that the plea was ill; and if no cause be shewn in four days to the contrary, judgment shall be entered for the plaintiff.

CASE 7.

Jo. Thirkettle against Reeve, and Edward Tye and Mary his Wife.

Easter Term, 29. Eliz.

The certainty of a declaration shall not be impeached by a collateral allegation in the plea.

1. Bac. Abr. 13.
2. Ld. Raym. 1203.

DEBT upon two obligations, each of them of 20l. against **REEVE**, executor of *Rob. Thirkettle*, and **EDWARD TYE** and **MARY** his wife, executors of the said *Rob. Thirkettle*; and declared upon two several obligations, made 14. July, and 23. Eliz. The defendant *Reeve* pleads, "*ne unques executor, ne unques administrator*," and upon this they were at issue. The other defendants, *Edward Tye* and *Mary* his wife, demand over of the obligations, and of the conditions. The condition of one was, that "WHEREAS *Agnes*, the mother of the testator, had devised to "the plaintiff forty pounds, upon condition to be performed by "the plaintiff, if the said *Robert* pay it to him after the performance of the condition, and within one year after the death of "*Agnes*, that then, &c." The condition of the other obligation was, "If he pay ten pounds after the performance of the condition, and within two years after the death of *Agnes*, that then, " &c." The defendants plead, that the said *Agnes*, 13. July, 23. Eliz. made her will, and devised the said forty pounds to the plaintiff, upon condition in the said will, that he shall release to the said *R. Thirkettle* all actions, &c. except the said forty pounds devised to him; and they alledge *in facto*, that the said *R. Thirkettle* required him to make the said release, and that he refused to make it, &c. and alledges the death of the said *Agnes*, 1. Aug. 27. Eliz.

(*Nota*, the declaration in this action was *Mich. 27. & 28. Eliz.* so within two years after the death of *Agnes*). The plaintiff said, "he was not required to make the release;" and upon this they were at issue; and also being at issue, "if *Reeve* were executor?" it was found that *Reeve* was not executor, and that the plaintiff was not required to make a release. It was afterwards alledged in arrest of judgment, that the plaintiff had brought his action upon two obligations, whereas one was not due; for it was brought within two years after the death of *Agnes*, and damages being given for both entirely, and he had no cause to recover upon one, he can recover no part.—But THE COURT held, that this is but the allegation of the defendant; and it appeareth not if *Agnes* then died or not; and the defendant hath not rested upon it, but pleaded another plea, *viz.* "a request to make a release," which is a collateral matter, and issue taken upon it, and so had relinquished the other matter: and judgment was given for the plaintiff.

THIRKETTLE
against
REEVE, &c.

Ante 68, 9.

NOTA. That afterwards the defendant upon this brought a writ of error in the exchequer-chamber, and this was assigned for error: and another error was assigned, that the plaintiff had sued one as executor, jointly with the true executor, who was not executor; and so had failed in his suit.—But all the Justices held neither of them to be errors. For to the naming one executor who was not, this is not in abatement of the bill or writ, but only that he shall be barred against him; and it will be a great mischief when divers are made executors, and one refuseth, if the naming of him should abate the writ. And to the other matter, they held it no error; for it was only a matter alledged by the defendants, and it appeareth not, whether it be true or false; and it is waived by the issue. And thereupon they all resolved the judgment to be affirmed.

In an action against two as executors, it is not error though one of them is not executor, Cowp. 332.

Elizabeth Mornington against Try and others.

CASE 8.

EJECTIONE FIRMÆ. Upon not guilty pleaded, it was found, that the abbot of *St. Peter of Gloucester*, 15. Hen. 8. being seised of the barn and tithes in question, let them by deed under the convent seals to three for sixty years; afterwards the abbey was dissolved, and their possessions, *et inter alia* the barn and tithes, were given by statute to the bishop of *Gloucester*; and afterwards, 15. Eliz. *John Wakeman*, bishop of *Gloucester*, let them to three *Cheynies* by indenture, rendering the ancient rent, for three lives; and the indenture was found *in hæc verba*; and in the end of it the confirmation of the dean and chapter was recited, which was of a lease made by *Rich. Wakeman*: but the jury did not *in facto* find that the dean and chapter did confirm it; nor found their deed *in hæc verba*, as they should have done, but only recited it as a thing annexed to the indenture; and found expressly the lease made to the husband of the plaintiff by the now bishop.—TANFIELD prayed judgment for the plaintiff; for the lease by *John Wakeman* was merely void, for there were twelve years to come of the ancient lease, so it must pass by grant of reversion; and no attornment is found; and the jury do not find a confirmation by the dean and chapter; and the confirmation reciteth a lease by *Robert Wakeman*, when it was by *John Wakeman*; and these

A special verdict cannot be amended by the notes of the officer of the court, after it is returned to the superior court. Post. 153. *Sed quærit.*

Cro. Jac. 185.
Salk. 47. 53.
Cro. Car. 338.
Wils. 33.
Bunb. 283.
Stra. 1297.
Carth. 506.
1. Burr. 383.
Cowp. 841.
Doug. 376.
30. 746.
1. Term Rep. 141.
Co. Lit. 3. 2.
Co. 11. 21. a

last

MORNINGTON
against
TRY AND
OTHERS.

Post. 150.

last faults were held to be incurable.—COKE moved, that the verdict should be amended; for the note given to the clerk of the assises was, that they intended to find the confirmation expressly, and of a lease made by *J. W.* And for the other point, tithes pass without attornment.—But THE COURT held clearly, that after verdict returned in court, this cannot be amended by any such suggestion; for then all verdicts may be prayed to be amended. But if any misprision was, suggestion ought to be made of it before the verdict returned; but now it was too late: wherefore judgment was given for the plaintiff.

CASE 9.

Richard Jackson against Robert Mordant.

Michaelmas Term, 29. & 30. Eliz. Roll

A declaration that husband and wife were seised to them and the heirs of the husband, and let to the plaintiff, and that the defendant obstructed his water-course, is good; for the commencement of the wife's estate, being inducement only, need not be shewn.

Post. 132. 154
181.

Hutt. 102.

Cro. Jac. 52.

Ld. Ray. 132.

5 Com. Dig. 103.

(a) Dougl. 330.

Cowp. 201.

ACTION UPON THE CASE. The plaintiff declareth, that whereas *Thomas Style* and *Margaret* his wife were seised to them, and the heirs of *Thomas*, of five acres of meadow lying near a river called *Westbury* river; and being so seised, by indenture let them to the plaintiff for one-and-twenty years, by force whereof he was possessed; the defendant such a day, &c. erected a water-mill *super et trans* the said river; by reason whereof *obstupavit* the water running in the said river with his mill; so that the water from time to time yearly, after the erecting of the said mill, overflowed the banks of the river in the said five acres of meadow, and them *inundavit*; by which they became barren *et scirposa*, to his damage one hundred pounds. And upon this declaration it was demurred in law, and argued this term.

The first exception was, Because he counts that the *baron* and *feme* were seised to them, and the heirs of the *baron*, and sheweth not how the estate began; for it was said, it being a special estate, and but a particular estate in the *feme*, the commencement of it ought to have been shewn.—But THE JUSTICES held it well enough, being an action on the case by their lessee (a); so that it is but a conveyance to the action, and the inheritance is in the *baron*. Second exception. Because he declares of a lease by husband and wife by indenture, and sheweth not that a rent was reserved, and then it cannot be the lease of the *feme*.—But THE COURT held it clearly to be good; for it is the lease of the *feme* till she disagree; and the inheritance being in the *baron*, it shall be good against him and his heirs.

Third exception, that the life of the *baron* was not averred. *Sed non allocatur*, for the reason aforesaid.—And the same term judgment was given for the plaintiff; and I was of counsel with the plaintiff.

CASE 10.

Thomas Broome against Robert Mordant.

Trinity Term, 30. Eliz. Roll 813.

A lease for years by husband and wife of the wife's land is good during the coverture. Cowp. 201. Dougl. 53.

ACTION UPON THE CASE. The plaintiff declares, that *Thomas Style* and *Margaret* his wife were seised of a water-mill called *Westbury-mill*, viz. the said *Thomas* in his demesne as of fee, and the said *Margaret* *ut de libera tenemento*; and being so

seised

seised, they and all those whose estate they had in the said mill, have had, time out of mind, &c. a water-course running in the river of *Westbury*, to a mill called *Innelley-mill*, in the county of *N.* to the said *Westbury-mill*, and from thence *super et trans* an acre of land of the defendant to a mill called *Mixbury-mill*, in the county of *Oxon*, and this without any erecting of any mill; and had, time out of mind, &c. the multure of divers inhabitants there of their corn, &c. and they being so seised, let the said mill to the plaintiff, &c. by indenture, by which he was possessed, until the defendant erected a new mill upon the said acre of land, *per quod obstupavit aquam prædictæ ita quod molendinum prædicti suffocatum fuit*, so that the plaintiff lost the profit of his mill from the first day of *July*, &c. until, &c. to his damage, &c. And hereupon it was demurred in law, and the same exceptions taken as in the case before, *Ld. Raym.* 132. and ruled as before.

And another exception was taken, for it is said the *baron* was seised in fee, and the *feme* in her demesne as freehold, but saith not of what estate, for her life, or for another's life.—2. Exception, because the prescription is alledged in the *baron* and *feme*, and the *feme* had only an estate for life, and so cannot prescribe.—*Sed non allocantur*. For to the first, the plaintiffs needed not shew what estate they had, it being by way of conveyance. And to the second, when the *feme* is jointly seised with her *baron* who had the fee, the prescription may be alledged in both. *Et sic adjudicatur*.

BROOME
against
MORDANT.

Ann Boocher against Ancel Samford.

Hilary Term, 30. Eliz. Roll 188.

CASE 11.

EJECTIONE FIRMÆ. Upon a special verdict, the case was this: *William Samford* was lord of the manor of *Stone-house*, within which manor there is a place known by the name of *Ebley*, in which is a house and six acres of land, to which tenement divers other lands throughout the whole manor were pertaining, and had been used with it by the space of sixty years, and had always passed by one grant, and under one rent (which was now in the hands of one *H. B.* copyholder of it); and the said *W. S.* being so seised, devised that his brother *Tho. Samford*, after the death of the said *H. B.* should have the tenement with the appurtenances in which *H. B.* dwelleth in *Ebley*, for sixty years, rendering 4*l.* *per annum* (the ancient rent being 45*s.*); but the house and the six acres were worth 5*l.*; and, If upon all this matter the other lands which were used with the house, and are out of *Ebley*, pass or not? was the question.—*COKE* argued that all passed; for they were always passed by one grant, and under one rent; and they are here granted *per nomen tenementi*. And it is to be first considered how these words (wherein he dwelleth in *Ebley*) shall refer to the dwelling, or to the tenement. And as to that, he said the words shall be referred *ut verba accipiantur aptè et in proprio sensu*, then (dwelleth) shall not be referred to land, but to the tenement. for a man cannot dwell in land; and relation shall always be *ut sententia non impediatur*, and not to the last antecedent; and here he deviseth the tenement with the appurtenances, which is all things belonging to it; and the lands out of *Ebley* were belonging to it. And it was adjudged in one *Batree's Case*, where one being sick sent for a scrivener, and gave him instructions, that he devised

Devise of the tenement with its appurtenances in which *B.* dwelleth in *E.* will pass land appurtenant although it lie out of *E.*

1. Leon. 34.
1. Roll. Abr. 613.
Jones, 379.
Cro. Car. 130.
447. 473.
4. Mod. 132.
1. Salk. 225.
Hob. 171.
Dyer, 376. b.
292.
Cro. Jac. 34.
Sav. 114.
3. Com. Dig. 443.
Flowd. 210.
Powell on Dev. 226.
Cowp. 94. 363.
808.
Douglass. 761. 763.
Bro. Ch. Caf. 127.
Moor, 222.
Cro. Car. 57.

dred pounds, and that the defendant had taken in this obligation, and made another in her own name with sureties to the obligor. —And upon the motion of HEALE, the Court held this was an administration, and it is in the nature of a payment, and so much of the testator's debt is by this discharged; and so it was said to be adjudged in *Wood's Case*. —NOTA. It was ruled accordingly, *Easter Term*, 30. Eliz. which was entered, *Mich.* 28. & 29. *Eliz.* *Ret.* 2625. *inter Stampe et Hutchins.*

Pigott against Ruffel.

Hilary Term, 30. *Eliz.* *Roll* 164.

PIGOTT sued two writs of error; one to reverse a fine; the other to reverse a common recovery, by reason of his nonage. —**TANFIELD** moved that the writ to reverse the fine was not well brought. The case was, *English* was tenant for life in right of his wife, the remainder to the plaintiff in fee, and they joined in a fine to *Ruffel*; so they all ought to join in the writ, and there ought to be summons and severance, and he cannot bring it alone. —**COKE** and **ATKINSON** *contra*. This writ is well brought by the plaintiff alone, for it is brought for an error *in fait*, viz. his nonage, and of his nonage the other can take no advantage; so the cause of the action being several and not joint, they cannot join in the action, 34. *Hen.* 6. in the case of attain, 7. *Hen.* 4. *pl.* 44. and they relied upon the case 29. *Aff.* 14. —**THE COURT** held the writ was well brought, because it is no error in the record, but an error *in fait*; and if two infants bring a writ of error, they must assign the errors severally; and therefore if one be within age, he must bring the writ alone (a).

MARTIN
against
WHIPPER.
5. Co. 33.
Dyer, 105. 166.
Bendl. 73.
1. Mod. 14.
1. And. 11.
4. Bac. Abr. 269.
2. Term Rep.
97. 587. 597.
CASE 15.

If a tenant for life and an infant in remainder join in a fine, the infant may bring a writ of error alone.
Post. 129.
1. Co. 76. b.
1. Leon. 317.
1. Strange. 234.
Cruise on Fines, 290.
3. Burr. 1805.
1. Ter. Rep. 86.
(a) It was moved again, and the fine was reversed quoad the infant only. *Post.* 124.

Reynold against Kingman and Brown.

Hilary Term, 30. *Eliz.* *Roll* 343.

EJECTIONE FIRMÆ. The case was, *H. Creeke*, who was seised of certain lands held by knight's service, let the same to *J. Creeke*, *HABENDUM* to him and one *Jo. Downeman*, for their lives, rendering rent; and afterwards devised the land to *Alice* his wife for life, the remainder over in fee, which was void for a third part, and died. *J. Creeke* the lessee died. *Jo. Downeman* pretending to be in as lessee, continueth in possession, and pays the rent to *Alice*. Afterwards one *Edward Creeke*, son and heir of the devisor, maketh a letter of attorney to *J. S.* to enter into all the land, and to enfeof the said *Jo. Downeman*, who maketh a feoffment accordingly. *J. Downeman* dieth seised. The question was, If this descent takes away the entry of *Alice*? —**HARRIS** argued that it did not, for when he enters and pays the rent to the devisee, he doth it as tenant at will, for he had colour to enter. And it was adjudged in this court, in a case between *Goos* and others, that where *J. S.* giveth an authority to *J. D.* to make leases of certain land, to certain persons, in the name of *J. S.* and *J. D.* maketh leases in his own name, which was void; yet although the lessees enter and die seised, this taketh not away the entry of *J. S.* for they enter by colour of title, and in the mean time are as tenants at will; and when the attorney of *Ed-*

What descent shall toll an entry.
Ante 56.
Post. 323. 615. 641.

3. Bac. Abr. 403.

REYNOLD
against
KINGMAN
and
BROWN.

Post 323.

ward Creeke enters to make a feoffment, the other was in possession for his lessor, 38. Hen. 6. and then cannot take livery from him that had no possession.—But WRAY, C. J. said he could not be tenant at will; for he had no colour to enter, his name in the *habendum* being void; but if he were tenant at will, by his taking a feoffment of a stranger his will is determined; and so his entry cannot reduce the possession to *Alice*. *Quâcunque viâ*, this is a descent, and *tolls* the entry: and it was adjudged accordingly.

CASE 17.

Knight against Bourne.

Judgment in
trover reversed.
Cro. Jac. 681.
Ld. Ray. 191.
1. Ter. Rep. 783.

ACTION upon trover of a horse. The judgment was, "*quod recuperet equum vel damna*," whereas it should be "*damna*" only; and the judgment was reversed.

Beveridge against Cony.

Easter Term, 30. Eliz. Roll 285. or 485.

Plea of payment
generally to debt
for rent, on a
lease made at one
place of land
lying in another
is good, after a
verdict where
the lease was
made.
Post. 259.

7. Co. 2. a.
Ld. Raym. 111.
Dougl. 683.

ERROR of a judgment in the common pleas. The matter was, a lease was made at *Northampton*, of land in *Cambridgeshire*; the lessee was obliged to perform the covenants contained in the indenture of lease; debt brought upon the obligation, and the breach assigned in not paying the rent: the defendant rejoined that he had paid it. Upon this they were at issue; and found for the plaintiff by an enquest of the county of *Northampton*, where the lease was made.—It was said in arrest of judgment that it was no good issue, because no place is alledged of payment, and the issue was mis-tried by a *visue* of the county of *Northampton*, whereas it ought to be of the county of *Cambridge* where the land was, for by intendment the payment was there. And so was the opinion of ANDERSON. But WYNDHAM, PERIAM, and RHODES *contra*. For although the bar was ill, because no place of payment was alledged, yet by the verdict it is made good, for a payment in one place is payment in all places; and it was adjudged there for the plaintiff.—Upon the writ of error brought, these two matters were assigned for error. *Vide* 45. Edw. 3. pl. 5. But afterwards the judgment was affirmed.

CASE 19.

Lancaster against Lowther.

Trinity Term, 30. Eliz. Roll 346.

An outlawry re-
versed for the
variance of a
letter.
Ante 50.

ERROR to reverse a judgment in outlawry.—1. Error assigned, that the original was against *Brian Lancaster, de Hutton Walmsley* in the county of *York*. The proclamations were against *Brian Lancaster, de Hutton*, leaving out *Walmsley*.—2. There are in the proclamations two letters of *t*, and in the original but one, *viz. Huton*: and the judgment was reversed.

CASE 20.

Austen and Steene against Courtney.

The word "*tene-*
"*ment*" is too
uncertain for a
fine.

11. Co. 55. a.
1. Leon. 188.
Owen, 93.

3. Sid. 340. Mad. Exch. 145. March 96. 2. Roll. Abr. 20. 7. Term Rep. 11.

ERROR to reverse a fine levied in *Exeter*, upon a plaint in nature of a writ of covenant.—1. Error assigned. That the plaint was *quod teneat conventionem de duobus tenementis in Exeter* (and abutted them on every side), which is uncertain, for "*tenement*" contains divers things, as rent, land, meadow, &c. as an *ejectionis firme* of a tenement, and an indictment that one entered in *ten-*

mentum

mentum with force, are not good; and this error was assigned in the plaint; for the fine relates to the covenant, and is levied *de tenementis prædict.*—2. Error. The fine levied in *Exeter* is void, for they cannot prescribe to levy fines, for then the queen should lose her fine *pro licentia concordandi*, 50. *Aff.* 9. 44. *Edw.* 3. *pl.* 29. & in 22. *Eliz.* it was ruled in a *Chester* case, that a fine levied there was void.—The judgment was reversed; but THE JUSTICES delivered no opinion whether a fine levied in *Exeter* was good or not.

AUSTIN
and
STEELE
against
COURTNEY.

Q. If a corporation can re-scribe to levy fines?
Post. 314.

Edwards against Ebsworth.

CASE 21.

INFORMATION. Upon the statute 35. *Hen.* 8. c. 17. for not fencing of coppices.—1. Exception. Because it is not alledged that the defendant had lawful interest in them, as the words of the statute are.—2. Because it is shewn that certain coppices were cut, but shews not what coppices they were.—3. Because it is recited that he shall forfeit for every rood 3s. 4d. whereas it should be for every rod of land.—But it was said the parliament roll is rood of land, and so was the last impressions; but for the two first exceptions the party was discharged.

Information
quashed for un-
certainty.

Pike against Cottington.

CASE 1.

In the Exchequer Chamber.

ERROR of a judgment in the queen's bench, in debt upon an obligation. The error assigned was, The defendant in the writ of error brought debt upon an obligation of 100l. The condition was, that if he pay 50l. at his house AT *Lockington*, in the parish of *Kilmerston*, that then, &c. The defendant pleaded payment, and the *venire facias* issued of the *visne* of *Lockington*.—And this was assigned for error; for it ought to be *de visneto de Kilmerston*; for *Lockington* shall not be intended to be a village, but a place known in *Kilmerston*. 6. *Hen.* 7. *pl.* 3. 11. *Hen.* 7. *pl.* 22. —But all THE JUSTICES held it no error, for *Lockington* shall be intended to be a village in the parish of *Kilmerston*, for divers villages may be in one parish; but if it had been at his house IN *Lockington* IN *Kilmerston*, then *Lockington* shall not be intended a village, but a place known in *Kilmerston*: and the judgment was affirmed.

Ante, 108.
Co. 11. 25. b.

Kingdon against Barne.

CASE 2.

ERROR of a judgment in the queen's bench, in trespass for taking of certain corn. The defendant justifieth the taking as his proper goods; and pleads a special justification. The plaintiff makes title to them by seisure, for that king *Philip* and queen *Mary*, by their letters patents enrolled in chancery, *dederunt et concesserunt villæ de Launceston* liberty of a market, &c. and shews a special cause of seisure, as an officer there; upon which it was demurred in law, and judgment for the plaintiff.—And the error assigned was, that he pleaded that the king and queen by letters patents, grant, &c. but saith not *sub magno sigillo confectas*. And this was clearly held an error; for if the grant was not under

Letters patents
must be pleaded
under the
GREAT SEAL.
Ante, 75.

10. Co. 94. b.
1. Term Rep.
149.

KINGDON
against
BARN.

the great seal, it is not good, and though he saith enrolled in Chancery, it is not good, for any patent may be enrolled there; and therefore the judgment was reversed.

CASE 3.

Bury against Pope.

An action for a nuisance does not lie for stopping another's lights, though they have continued for forty years.

CASE for stopping of his light.--It was agreed by all THE JUSTICES, that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's lands, and this house and the lights have continued by the space of thirty or forty years, yet the other may upon his own land and soil lawfully erect an house or other thing against the said lights and windows, and the other can have no action; for it was his folly to build his house so near to the other's land: and it was adjudged accordingly.

11. Hen. 4. 47.

1. Ro. Ab. 107.

9. Co. 58. b.

Salk. 459.

3. B. l. Com. 217.

NOTA. *Cujus est solium, ejus est summitas usque ad cælum.* Temp. Ed. 1.

1. Lev. 162. 122. 1. Sid. 167. 1. Vent. 257. Cro. Jac. 159. 2. Vern. 646. Ld. Raym. 392.

CASE 4.

Bilford against Fox and his Wife.

In debt on bond against a husband and a wife executrix, the husband on the exigent shall put in an appearance, attorney, and *superfedeas* for himself and his wife.

DEBT upon an obligation against the defendant and his wife, executrix of her former husband. The *baron* appeared upon the exigent, and would have put in a *superfedeas* for himself alone, without any appearance or *superfedeas* for his wife; and so at the first THE JUSTICES thought he might, as 18. Edw. 4. & 14. Hen. 6. are. But *Antropos*, the attorney, said it was a practice to defeat the plaintiff of his debt, and shewed a precedent of 18. Eliz. that in the like action brought against Somers and his wife, Somers would have put in a *superfedeas* for himself only; but he was not suffered, but shall be compelled to put in an appearance, attorney, and *superfedeas* for his wife also. And so all THE JUSTICES did now hold; otherwise an exigent *de novo* shall issue out against him.

1. Roll. Abr.

580. 583.

1. Leon. 138.

Hob. 179. Cro. Car. 58.

St. r. 1272.

CASE 5.

Hunt against Sone.

Hilary Term, 30. Eliz. Roll 1732.

On a promise to pay so much a year for a certain number of years, in consideration of occupying lands, several actions lie upon every 1 on payment.

AN ASSUMPSIT. And declared, that in consideration he promised the defendant that he should have and occupy such lands, from such a day, for five years, the defendant promised to pay him 20 l. for every year, at two feasts, &c. and avers that the defendant had occupied the land for one year and a half, and for 30 l. due for that time he brought action: and after verdict, it was moved in arrest of judgment, that this promise and consideration was a thing entire, and not severable; and therefore ought to have averred that the defendant had enjoyed the land for five years, otherwise the action lieth not.—But it was adjudged for the plaintiff; for all THE COURT held, that if the promise had been that he should enjoy the land for five years, and in consideration thereof he shall pay him 100 l. in five years, viz. 20 l. *per annum*, there the action lieth not for part till all the term be expired; but the promise and agreement being that 20 l. shall be paid for every year, it is otherwise; and several actions lie for every day of payment. And RHODES, Justice, said, so it was lately adjudged in *Sir Thomas Foscelyne's Case*, that in consideration one would marry his daughter, that he will pay to him 300 l. *scilicet*, fifty pounds by the year during

Cro. Jac. 598.

Cro. Car. 241.

Moor, 13.

1. Ro. Ab. 29

2. Saund. 337.

2. Leon. 107.

Co. Lit. 202. b.

Post. 776. 807.

Andrews, 370.

six years, there at the end of every year a several action lieth for fifty pounds.

HUNT
against
SONE.

Rookesby's Cafe.

CASE 6.

QUARE IMPEDIT. The original writ wanted this word, "*ad*;" for whereas the writ should be, *quæ ad donationem suam spectat*, the writ was, *quæ donationem suam spectat*; and after divers motions for amending it, the writ by award was amended, and "*ad*" put in: and the principal reason was, that the six months were passed, and if the writ should abate which was purchased within the six months, the plaintiff should be remediless to recover his presentation.

A *quare impedit* may be amended where the abatement of it would cause defect of justice.

Ante 79.

Post. 286. 462. 644.

8. Co. 159.

1. Com. Dig. 318. Cowp. 229. Dougl. 116. 1. Term Rep. 237. 782.

Albany against The Bishop of St. Asaph.

CASE 7.

Trinity Term, 27. Eliz. Roll .

QUARE IMPEDIT, for the church of *Whittington*. The bishop pleaded that the service there was in the *Welsh* tongue, and that the parishioners understood not the *English*, and that the presentee could not speak *Welsh*; and therefore he refused him.—And all THE JUSTICES held this a good cause of refusal, for he cannot instruct his flock according to his duty and charge. But in this case the plaintiff had presented sixteen days within the six months, and the bishop gave no notice of the inability of the clerk, till three days after the six months expired. And the Court held, that notice ought to be given to the patron himself, if he be resident in the county; and if not, a public intimation ought to be on the church-door; and notice of this matter ought to have been given immediately when he was presented and examined, or within such convenient speed as might be; but when the bishop is to enquire of the behaviour of the clerk, he shall have longer time. And for this cause judgment was given for the plaintiff.

If a benefice be in *Wales*, and the clerk does not understand *Welsh*, the bishop may refuse him, but he must give notice of it to the patron.

1. Leon. 31.

Ld. Ray. 192.

3. Com. Dig. 212.

2. Salk. 539.

Shepard against Kearne.

CASE 8.

DEBT upon an obligation. The condition was, that if one pay to the plaintiff within one month after the death of *Lady Learne* 30l. or twenty nine, at the election of the obligee, that then, &c. The defendant pleads, that the plaintiff had made no election. The plaintiff demurred; and it was adjudged that the bar was good; and judgment against the plaintiff.

Where one of two things are to be performed by the obligor at the election of the obligee, "*no election*" is a good bar to debt on the bond.

The Queen against The Bishop of Lincoln, and Ligh the Incumbent.

CASE 9.

QUARE IMPEDIT. The case was, After lapse incurred to the queen, the bishop being patron doth present, and afterwards the successor of the bishop certifieth against this incumbent, that he had refused to pay the tenths, and then the bishop collat-

If a church becomes void by the act of the incumbent, and the patron presents and dies,

yet the king shall not lose his presentation. Owen, 5. 89. Goulds. 78. 83. 86. Moor, 259.

THE QUEEN
against
LINCOLN
and LICH.

Ante 44.
Co. 7. 28. a.
Post. 790. 811.

eth the defendant, who was inducted; the queen brings *quare impedit*.—And it was adjudged that the queen hath not lost her presentation; but if the incumbent had died, it were otherwise: for here the church became void by the incumbent's own act; so if he had resigned or been deprived; and it would be inconvenient if the queen should lose her presentment by the incumbent's own act.

CASE 10.

Michael against Scockwith.

A bond cancelled after issue joined, may be given in evidence as the defendant's deed.

Co. 5. 119. b.

DEBT upon an obligation. The issue was, *non est factum*. The jury found that the defendant did seal and deliver it as his deed, but that after the day of the issue joined, the seal was pulled off from the obligation.—And the plaintiff had judgment; for it was the defendant's deed at the time when the issue was joined, and the trial shall relate to it, although the deed was cancelled afterwards. *Vide* 36. Hen. 8.

CASE 11.

May and Bannister against Street.

Lands out of a borough cannot be holden in *libero burgagio*.

S.C. Moor, 257.
Co. Lit. 109. 111.

EJECTIONE FIRMÆ. It was found by verdict, that the prior of *Merton* was seised of a house in *Southwark*, held of the archbishop of *Canterbury*, as of his borough of *Southwark*, and 30. Hen. 8. surrenders it to the king, *Henry* the eighth, who granted the said messuage and divers other lands in *London*, *Middlesex*, and *Essex*, to *J. S.* and his heirs, to hold of him in *libero burgagio* by fealty for all services and demands, and not in *capite*. Queen *Mary* grants the manor and borough of *Southwark* to the mayor and commonalty of *London*, and the tenant of the said messuage died without heir. The question was, Whether the now queen or the patentees of the borough should have the escheat?—And it was adjudged for the queen: for the first patentee of the messuage held it of the queen, in socage in *capite*, as of a feigniori in *gross*, and the words in *libero burgagio* are merely void, for the land out of the borough cannot be holden in *libero burgagio*; and there shall not be several tenures, for one tenure was reserved by the king for all, and therefore of necessity it shall be a tenure in socage of the king.

CASE 12.

Stampe against Hutchins.

Michaelmas Term, 28. & 29. Eliz. Roll 2625.

If a person call in a bond of an intestate, and give their own bond for part of the sum with a promise to pay the remainder, it is an administration of the intestate's effects.

Ante 115.

1. Leon. 111.

Moor, 260.

3. Co. 33. 2. Term Rep. 97. 587. 597.

DEBT against the defendant as administratrix. She pleaded *plene administravit*. The jury found that the intestate was indebted to divers by obligations, and that after his death the defendant had taken in the obligations, and had obliged herself to pay the greater part of the sums contained in the obligations, at certain days to come, and for the residue had promised to the parties, that in consideration of delivery in of the said obligations, that she would pay, &c.—And by the opinion of *ANDERSON*, *C. J.* *WYNDHAM* and *PERIAM*, it was held clearly a good administration, so that the property of the goods of the intestate to that value, were altered and changed in the defendant.

Hunt and his Wife against Gilburne.

CASE 13.

DOWER. And demanded the third part of the lands of *Augustine* her former husband, in *Kent*. The defendant pleaded that the custom there is, that the wives shall have the moiety of the lands of their husbands for their dower, and shall hold them so long as they live chaste and unmarried, *et non secundum cursum communis legis*; and that the *feme* since the death of her former husband, had taken the demandant *Hunt* to husband; and so demanded judgment, if she shall have dower.—The opinion of THE COURT was, that the prescription in the bar was good, being in the negative; and so it was adjudged.—*PERIAM* said, if he had not pleaded in the negative, yet the demandant shall not have dower; for the custom that wives shall have the moiety is the common law in *Kent*, and no other law runs there.

By the custom of gavelkind, a wife shall be endowed of a moiety so long as she lives chaste and unmarried; and she must take it by the custom. Post. 825.

S.C. Gould. 108.
1. Leon. 133.
Moor, 260.
Sav. 91.
F. N. B. 150.
Cro. Car. 562.

1. Sid. 77. Co. Lit. 33. b. and Mr. Hargrave's note [10]. Rob. on Gav. 160. Cowp. 481.

Hughson against Ann Webb.

CASE 14.

Easter Term, 30. Eliz. Roll 420.

DEBT against the defendant as administratrix upon a contract of the intestate. The defendant pleads fully administered, and found against her. It was moved in arrest of judgment, that debt upon a contract lieth not against an administrator.—And it was resolved by all THE JUSTICES, that the plaintiff shall not have judgment; for although the defendant by her plea admitted that the action lay against her, yet when the matter at the beginning is not sufficient to charge her, the Court *ex officio* ought to abate the writ, without exception of the party, 15. *Edw. 4. pl. 25.* and the defendant's plea takes not away the authority of the Court, but they may abate the writ at any time after. 1. Sid. 333. contra.

Debt does not lie against an administrator upon a contract of the intestate, and the Court will abate the writ after verdict. Post. 426. 454.

Sed vide Vaugh. 94. 101.
9. Co. 87.

10. Co. 77. 1. Lev. 200. Cowp. 371.

Everard against Greene.

CASE 15.

TRESPASS. The writ supposed the trespass to be done *apud Henisale*, and the declaration supposed the trespass to be *apud Baykett* in *Henisale*; and after verdict this variance was alleged in arrest of judgment: *SNAGO for the plaintiff*; *FRANCIS GAWDY for the defendant*.—THE COURT held, that for this variance judgment should be stayed; and the difference is, where there is no original, it is aided by the 18. *Eliz. c. 14.* for jeofails; but where there is an original, and this varies from the declaration, it is otherwise; and a precedent in the queen's bench was shewn to be adjudged accordingly.

Where there is no original, the defect is aided by the statute of jeofails; but not where there is a bad original. Ante 119. contra. Post. 722.

1. Mod. 3.
1. Sid. 423.
2. Keb. 544. 583.

1. Saund. 317. Yelv. 108.

Stevens against Lawton and his Wife.

CASE 16.

Michaelmas Term, 29. & 30. Eliz. Roll 2578.

EJECTIONE FIRMÆ. Upon special verdict the case was, *Sampson Bell* let land to *W.* his son, and *P.* his wife, *et eorum*

Issue after-born cannot take by a grant to *A.* and

B. et eorum primogenitæ proli successivæ. Ante 10. 58. Post. 334. Moor, 103. Plow. 29. b. 2. Roll. 417. 1. Roll. Rep. 325. Owen, 152. 64. Vide Harg. Co. Lit. 9. a. note [3]. and 20. b. note [2].

primogenitæ

STEVENS
against
LAWTON
and his
WIFE.

primogenitæ proli successivè; they had then no issue, but afterwards they had issue: the question was, If after the death of *W.* and *P.* the issue shall take by way of remainder or otherwise?—And THE COURT held, he shall take nothing, for he was not *in esse* at the time of the grant, and by the grant he is to take jointly: and so it was adjudged.

CASE 17.

Chamberlain against Stanton.

Michaelmas Term, 30. & 31. Eliz. Roll 656.

A deed is not
executed until
it be formally
delivered.
Apte 7.

Harg. Co. Lit.
36. a. note [b].
Owen, 95.

Dyer, 192. in marg. 1. Term Rep. 86.

DEBT upon an obligation. The defendant pleaded *non est factum*. The jury find that the defendant caused the obligation to be written, and signed, and sealed it; and then laid it upon a table, and the plaintiff came and took it. The question was, If this was the defendant's deed?—The opinion of all THE JUSTICES was, that it was not, without other circumstances found by the jury.

CASE 18.

Johnson against Gabriel and Bellamy.

Trinity Term, 29. Eliz. Roll 334.

A fine levied by
a devise in fee
in remainder,
before he attains
the age at which
the devise vests,
will bar his heir.
Post. 142. 362.
610.

S. C. 10. Co. 50.
S. C. 2. Leon. 36.
Cro. Car. 425.
Shep. Touch. 25.
Cruise on Fines,
165.

EJECTIONE FIRMÆ. The case upon special verdict was, *Grant* was seised in fee of the land, and devised it to his wife for life; and when *John Grant*, the son of his brother, came to his age of twenty-five years, then he shall have it in fee. *John*, before his age of twenty-five years, levieth a fine to *A. B.* and after his said age of twenty-five died.—And it was adjudged that his heir shall be barred by this fine levied by him, and so it shall be if the land had been given to him in tail, and there shall be no averment, that *partes ad finem nihil habuere, &c.* And this being found by verdict, shall bar as well as if it had been pleaded as an estoppel (a).

(a) *Sir Edward Coke* says that no judgment was entered in this case; but this is contradicted by the report of it in 2. Leon. 36. And it is cited in *Raym.* 150. as adjudged that this estate in contingency was barred by force of the words of 31. Hen. 8. c. 36.

Hilary

Hilary Term,

35. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*

Sir Francis Gawdy, *Knt.*

John Clench, *Esq.*

Robert Schute, *Esq.*

} *Justices.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

Mott against Hales.

Michaelmas Term, 30. & 31. Eliz. Roll 562.

CASE 1.

DEBT upon lease for years. The case was, A parson maketh a lease to the plaintiff for twenty-one years, after the 13. Eliz. c. 20. of lands usually let, rendering the ancient rent. The patron and ordinary confirm the lease. The lessee lets part of the term to the defendant. The parson dieth. The successor enters, and lets it to the defendant, against whom the first lessee brought debt upon the former lease, who pleads the 13. Eliz. c. 20. that makes all leases void, where the parson is non-resident or absent for eighty days, &c. and that the successor hath entered, &c.—Upon this plea the plaintiff demurred; and it was argued by COKE and GODFREY, that the statute extends not but to the parsons that make the leases and are non-resident or absent, &c. and extends not to leases of parsons which afterwards die; for such persons cannot be said to be absent which are not *in esse*, especially the statute giving liberty to let land usually let, which shall be vain, being confirmed by the patron and ordinary, if they continue no longer than the parson's life.—But it was adjudged that this lease is void by the death of the incumbent; for THE JUSTICES said, that the statute doth provide against dilapidations, and for maintenance of hospitality; and therefore provideth not only that leases shall be void for non-residency, &c. but by death or resignation, for otherwise dilapidations shall be in the time of the successor, and he cannot maintain hospitality: and so it was adjudged.

The death of a parson is a non-residency within the meaning of 13. Eliz. c. 20. so as to avoid his leases.

Post. 490.

Moor, 270.

Sed vide

2. Lev. 61.

1. Vent. 244.

3. Keb. 46. 107.

193.

3. Bac. Abr.

396. 371.

contra.

Cowp. 129. 429.

2. Term Rep.

749.

Barkly and Gibbs against Kempstow.

Trinity Term, 30. Eliz. Roll 64.

CASE 2.

ASSUMPSIT. Plaintiffs declare, that *civitas Worcester fuit antiqua civitas*, and that all pleas determinable there were used to be by suit before the bailiffs, chamberlain, and aldermen there determined, and the bailiffs, &c. had use to have their *servientem ad clavam*, to make arrests; and that there they had a prison, and

In an action for an escape it is not necessary to state that the warrant was under seal, or that the plaintiff was dam-

ned. Ante 53. Post. 625. Hob. 14. 3. Will. 268. Cowp. 61.

2. Term Rep. 5. that

BARKLY
and
GIBBS
against
KEMPSTOW.

that the bailiffs time out of mind were keepers of the prison, and of all the prisoners there: and that whereas the defendant had a house adjoining to the prison, in which the bailiffs had use to commit their prisoners to be safely kept; and whereas one *M.* had affirmed a plaint of 18l. against *Worsley* in the same court before the bailiff, &c. which was a plea there determinable by custom, *per quod* they *mandaverunt quoddam warrantum* to the said serjeant to arrest him, by force whereof he arrested him and brought him to the next court, and the plaintiffs being bailiffs committed him to prison; and the defendant having the said house adjoining to the prison, in consideration that the plaintiffs committed the prisoner to him to keep, by which he might make his commodity, by uttering his meat and drink, and might have as great benefit as he used to have, promised to keep him safely, and save the plaintiffs harmless of all escapes; whereupon they committed the prisoner to his house to keep, &c. he such a day had suffered him to escape, by which they were damnified. Upon *non assumpsit* pleaded, it was found for the plaintiffs, and divers matters alledged in arrest of judgment.—1. Because it is alledged that *mandaverunt warrantum*, &c. but shew not that it was in writing under seal, as it ought to be. *Sed non allocatur*, for it shall be so intended.—2. It was not alledged how they were damnified, *viz.* that they were sued for this escape, or otherwise molested. *Sed non allocatur*, for immediately upon the escape they were damnified and in danger to be sued, and might sue the defendant presently, and not tarry till they were sued.

Consideration in
assumpsit.

2. Burr. 925, 926.

It was held upon good advisement, that this was a good consideration to make an *assumpsit*, *viz.* the uttering of his meat, &c.

CASE 3.

Pigot against Ruffel.

Vide Ante, page 115. Case 15.

If lessee for life
and an infant re-
versioner join in
a fine, he may
reverse it for
nonage, but he
cannot enter for
the forfeiture.

Ante 115.

Post. 129. 290.

1. Co. 76. b.

1. Leon. 317.

Hob. 278.

2. Leon. 108.

Moor, 565.

1. Wood's Con.

84.

3. Burr. 1794.

Cowp. 702.

1. Term Rep.

86.

IT was moved by TANFIELD, that the writs of error were not good, for the writ of error upon the recovery made only mention of one voucher, when it was a double voucher; so the Justices had no warrant to examine it. 1. The writ of error upon the fine was ill, for the writ makes mention of an hundred and five acres, and for this variance it is not good.—ATKINSON and COKE *contra*. 1. The writ of error upon the recovery was well enough, for so are all the precedents to make mention of one voucher being betwixt the defendant and tenant; but if it had been between the first and second vouchee, then both ought to be mentioned. And as to the fine, it agreeth with the record, which is with the *custos breviarum*.—But WRAY, C. J. said, the principal part of the fine is with the *chirographer*, and it ought to agree with it, else it is not good. And here it was held that if lessee for life and he in the reversion join in a fine to a stranger, and the reversioner reverseth the fine for nonage, yet he shall not enter for forfeiture, because he joined in the fine and consented to it: and afterward the fine was reversed *quoad* the infant only.

Patridge's

Partridge's Case.

CASE 4.

QUO WARRANTO. A demurrer to the bar. It was held by all the Justices in speaking to it, that a man may prescribe to hold a leet oftener and at other times than are mentioned in *MAGNA CHARTA*, cap. 11. for it is in the affirmative.

How often a leet may be held, &c. Post. 245.

S. C. Leon. 212. s. Inst. 72.

2. Hawk. P. C. 90. 5. Com. Dig. 160.

POPHAM said, that want of a pillory or tumbrel is cause of forfeiture of a leet (a). 3. Edw. 1. "Leet" 12.—COKE contra. (a) 2. Hawk. 114

POPHAM said, that a general pardon being with divers exceptions, he that will take advantage of it must plead it, and that he is not a person excepted; otherwise of a general pardon except 7. S. for there the Court may take conusance that he is not 7. S. 8. Edw. 4. pl. 7.

How a pardon must be pleaded. 2. Jones, 26.

Str. 529. 1272. 362.

2. Hawk. 560.

THE COURT held, that it is not sufficient in a *quo warranto* of liberties to derive an interest to a stranger in them from the queen, without making title to himself, for the writ is *quo warranto* he himself useth them.

In *quo warranto* the plaintiff must shew title in himself.

1. Term Rep. 4.

Cage against Peyton and Everet.

CASE 5.

Trinity Term, 30. Eliz. Roll 349.

TRESPASS *quare clausum bosci sui vocat'* Frith fregit, et forty loads of the wood did take and carry away. The defendant pleaded that the place WHERE was parcel of the manor of *Great Horneby*, which manor the *Earl of Oxford* let to *Heywood* for years, "exceptis boscis, arboribus mahermiis, grossis arboribus, et subboscis," but did not covenant and agree that the lessee and his assigns might take reasonable fire-bote and hedge-bote *super præmissa prædicta* during the term. The earl afterwards conveyed the reversion to the plaintiff, and they as servants of the lessee justify for reasonable fire-bote, &c. The question was, If in the place where, &c. being parcel of the wood which is excepted out of the lease, if by reason of these words, *super præmissa prædicta* they might take trees, or if it shall be only referred to the land demised?

A lease of a manor exceptis boscis, arboribus, &c. with a covenant to take fire-bote *super præmissa prædicta*, shall only extend to the land demised. Post. 782.

Cowp. 9.

GODFREY and EGERTON for the plaintiff. The fire-bote is to be taken only upon the land let, for that which is excepted is not let; and *præmissa* shall be taken for *prædimissa*.—SNAGG contra.

WRAY, C. J. The agreement that he shall take fire-bote, &c. *super præmissa* shall only extend to the land let; but if he had averred that there was not sufficient upon the land let, that might peradventure alter the case: and so was the opinion of the other Justices.—Judgment was given for the plaintiff.

Ireland against Higgins.

CASE 6.

Trinity Term, 30. Eliz. Roll 403.

ASSUMPSIT. The plaintiff declareth, that whereas he was possessor of a *grey-hound*, which came to the defendant's hands by trover, and that he promised to deliver it upon request, the defendant demurred upon the declaration.—LEE argued the action did not lie; for being out of the plaintiff's possession, he had no

Trover lies for a greyhound, and it need not be averred that he was tame.—A mastiff, a hound, a spaniel, and a

tumbler, the law will take notice of. 3. Levinz, 330. 2. Leon. 283. 1. Bro. Ent. 144. 12. Hen. 8. pl. 4. 5. Co. 7. 17 b. Hob. 283. 1. Saund. 84. 1. Roll. Abr. 5. Owen, 94. 2. Cro. 44. 463. 3. Low. 219. 2001. Cro. Jac. 463.

IRELAND
against
Hiccupine.

2. Salk. 667.

property in it, being *fera naturæ*, 14. Eliz. Dyer, 306. 12. Hen. 8. and by a grant of *omnia bona et catalla*, a dog passeth not.—TANFIELD *contra*. He agreed that if it were *fera naturæ* there was no consideration of the promise, but a dog is a thing that is tame by industry of man, and the law regardeth it as any other beast, and is of as good use: and there be four kind of dogs which the law regards, *viz.* a mastiff, a hound, which comprehends a greyhound a spaniel and tumbler: and he had seen a precedent in 13. Hen. 7. Roll 35. where in trespass of assault and battery, the defendant justified that J. S. was possessed of a dog *ut de bonis propriis*, and delivered it to him to keep, and that the plaintiff would have taken it from him, in which he resisted him; and in defence and custody of his dog he beat him, and the hurt which he had was *de son tort demesne*, &c. and to this the plaintiff was put to answer, and said *de son tort*, &c. which proveth a property in the dog, when he justifieth the beating of one in defence of it. 2. Edw. 2. "Avowry". A replevin lieth of a ferret, which is of a more base nature, and 23. Eliz. J. S. brought trespass for taking of a blood-hound; and found for him, and he recovered 10l. damages. And the plaintiff need not in this case aver the dog was tame, for the law intends it, as of a horse. And it was adjudged for the plaintiff.

CASE 7.

Stone against Wythipol, Executor P. Wythipol.

Trinity Term, 30. Eliz. Roll 777, or 771.

Assumpsit cannot be maintained against an executor, on a promise to pay the debt of his testator, if the testator was under age at the time the original contract was made, unless he had promised to pay after he came of age; for there was not originally any cause of action.
Post. 700.

Dyer, 272. in mar.
1. Ro. Ab. 24. 18.
1. Leon. 114.
Yelv. 184.
4. Leon. 5.
1. Sid. 89.
Strange, 94. 592.
Cowp. 375.
2. Term Rep. 763.

ASSUMPSIT. And declares, that whereas the testator was indebted to him for certain pieces of velvet, and for 5l. of money lent, *et pro diversis alijs mercimonijs, bonis et catallis*, and promised to pay him at such a day, and died before the day; and the plaintiff having an intent to sue the defendant, he required him to stop his suit till such a day, and he would pay him or give him security; whereupon he stayed, &c. The defendant shewed that at the time of the delivery of the goods to the testator, he was within age; and thereupon it was demurred.—EGERTON *for the plaintiff*. That the consideration here is good, and consists of divers parts; the debt precedent, the testator's promise though within age, and the defendant's promise. And the promise of the infant is not void, but for his nonage he may help himself by plea; but if debt had been brought against him, and he pleads *nihil debet*, it shall be found against him: and if at his full age he had promised payment, it had been good, and *in foro conscientie* the promise of the infant had been good. And 9. Eliz. the case was, Lord Gray was indebted to divers, and after his death Lord Gray his son, who was not his executor nor chargeable with the debts, when the creditors complained and demanded their debts of him, told them, that if his father was indebted to them, he would pay them; and upon this it was held an action lay, and the promise of the executor is upon good consideration; for the plaintiff surceased his suit; and the executor was freed of trouble, and this matter will maintain suit in chancery.—COKE *contra*. That it is no consideration, for every consideration that doth charge the defendant in an *assumpsit*, must be to the benefit of the defendant or charge of the plaintiff, and

and no case can be put out of this rule. And this contract by the infant was void; and staying of suit is no benefit to the defendant, nor any charge to the plaintiff more than was before. And this is no consideration to sue in chancery, for no suit there against an express rule of common law, and denied the case of *Lord Gray*; and the defendant being not chargeable to pay the money, the staying of suit was no benefit to him.—And afterwards THE COURT was clear of opinion the action did not lie, for the contract of the infant was merely void, and in debt against him he might plead *nihil debet*.—EGERTON said it was adjudged in this court, in *Edmunds v. Burton*, that where an infant was bound in an obligation, and at his full age he promised payment, an action was maintainable against his executor upon this promise: to which the Court agreed; for the bond which was the ground of it was not void, but voidable, and he could not plead *non est factum*, or *nihil debet* to a bond (a); and if at his full age he had accepted a defeasance of the bond, this had made it good; and in the case cited the promise was by the infant himself, which in conscience he ought to pay; but the defendant is in a remote degree.—And it was adjudged against the plaintiff.

STONE
against
WYTHIOL.

Post. 700.

(a) 5. Co. 119.
2. Inst. 483.
Pop. 176.
10. Co. 43.

Wheeler against Thorogood.

CASE 3.

EJECTIONE FIRMÆ. It was held clearly by THE COURT, that if *J. S.* maketh a lease to *B.* to commence two years after, that after the two years are expired, *B.* before any entry may grant his term, although the lessor doth continue in possession.

A lessee may
grant his term
before entry.
Ante 15.

5. Co. 124. 3. Bac. Abr. 446. Dougl. 461.

Moody against Lewen.

CASE 9.

In the Common Pleas.

Michaelmas Term, 29. & 30. Eliz. Roll 2529.

REPLEVIN. Upon a special verdict, it was found that *Trin.* 14. Eliz. a fine was levied between *Lovelace* and *Rutland*, plaintiffs, and *Fooke* and seven others, deforceants of the manor of *D. &c.* by which *Fooke* and the others did acknowledge the manor, &c. to the plaintiffs *come ceo*, &c. They granted it to them, &c. rendering rent with a *nomine pæne*, and cause of distress to *Fooke* in fee, who granted it to *Horden*, who conveyed it to the avowant. The plaintiff traversed the rent to *Horden modo et formâ*, &c. and it was found that *Fooke* in his grant did recite that the fine was levied inter *Fooke* and seven others, plaintiffs, and *Lovelace* and *Rutland*, deforceants of the manor, and that the said *Lovelace* and *Rutland* granted by it the rent, &c. to *Fooke* in fee, and he granted it to *Horden*: and, If this rent by reason of this mis-recital was well granted? they prayed the discretion, &c. It was argued by *SHUTTLEWORTH* for the plaintiff, and by *WALMSLEY* for the defendant; and it was adjudged a good grant, for there is sufficient certainty of the thing granted, and of the intention of the parties to grant it; and nothing is mistaken but the deforceants and plaintiffs in the fine, which is not material: and it was adjudged for the defendant, that he should have return.

A grant of a
manor is good,
although in re-
citing a fine, it
mistakes the
plaintiff for the
deforçant.

Hooper

CASE 10.

Hooper against Gomerfal and his Wife.

Trinity Term, 30. Eliz. Roll 2403.

Where there are different additions to the same name, it must be averred that they mean one person.

Post. 267.

DEBT against the defendant *Gomerfal* and his wife, executrix of *Henry Woodlade of London, taylor*. The defendants plead a recovery against them by *J. S.* by the names of *J. Gomerfal* and *Elizabeth* his wife, executrix of *Henry Woodlade, of London, barber-chyrurgeon*, and that *ultra* the sum recovered they had nothing, &c. Upon this it was demurred; and adjudged no good plea, because they took no averment that *Henry Woodlade taylor* and *Henry Woodlade barber-chyrurgeon* were the same person.

CASE 11.

Gosling against Warburton and Crispe.

Michaelmas Term, 29. & 30. Eliz. Roll 334.

The acceptance of dower is a waiver of a right to an annuity devised in recompence of dower out of the same lands which were liable to dower.

Vide *Sturges' Cafe*, Dyer, 91.
2. *Vernon*, 365.
1. *Eq. Ca. Ab. Dower*, B.
9. *Mod.* 152.
4. *Co. 4. b.*
Harg. Co. Lit. 366. note [1].
1. *Bro. Ch. Caf.* 292.

EJECTIONE FIRMÆ. The case was, *Frencham* devised his land to *M.* his wife till *P.* his daughter came to the age of nineteen years, and afterwards to *P.* in tail, remainder over in fee; and devised further, that *P.* should pay after her age of nineteen years to his wife twelve pounds *per annum* in recompence of her dower; and if she failed of payment, that *M.* should have the land for her life. *Mary*, before *P.* came to the age of nineteen years, brought a writ of dower, and recovered a third part; and after *P.* came to her age of nineteen years, for non-payment of the twelve pounds *M.* entered; and the question was, If her entry were lawful?

SHUTTLEWORTH argued that it was, and that she had not waived the benefit to have the lands by the *devise*, by bringing her writ of dower, for then she had no title to it, but her title accrued by the non-payment of her twelve pounds.—*WALMSLEY contra.*

And afterwards it was adjudged, that she having recovered a third part in dower, she shall not have the rent by the will; and it is against the intention of the will she shall have both, and the acceptance of one is a waiver of the other.—And *Mich.* 31. & 32. *Eliz.* error was brought, and the judgment was affirmed; the record of which is *Easter* 31. *Eliz. Rot.* 247.

CASE 12.

Lowe against Lowe.

31. Eliz.—In the Exchequer Chamber.

A term held *en auter droit* does not merge by a descent of the inheritance to the termor.

Moor, 268. and see 3. *Leon.* 110. where this case is reported at large.
2. *Anders.* 17, 18.

EJECTIONE FIRMÆ. Upon special verdict the case was, *Vincent Lowe* had issue three sons, and devised his land to his second son for thirty years to perform his will and pay his debts, and made him his executor; and “if he died within the thirty years, that then his third son shall have such term as shall be arrear of the thirty years;” and dieth. The eldest son dieth without issue, and the inheritance descends to the second son; he dieth within the thirty years, having issue. The question was between the uncle and the nephew, If the third son shall have the land during the residue of the thirty years?—It was argued by *PIGOTT* for the plaintiff, and *BEAUMONT* for the defendant, and adjudged for the uncle plaintiff; for although the term was extinct in the second son, yet this is a new devise to the third son; for the words are, that he shall have such a term, &c.

Easter

Easter Term,

31. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*Sir Francis Gawdy, *Knt.*John Clench, *Esq.*Robert Schute, *Esq.*} *Justices.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*

Charnock and his Wife against Worsley.

Trinity Term, 30. Eliz. Roll 833.

CASE 1.

ERROR. The case was, *Baron and feme* levied a fine, the *feme* being within age; the *baron* and *feme* brought a writ of error, and she was adjudged within age; and, If the judgment shall be, that the fine shall be reversed generally or *quoad* the *feme* only? was the question.—Of the plaintiffs part, two precedents were shewn, *Trin. 2. Hen. 4. Ret. 49. & Pas. 6. Hen. 8. Rot 26.* that the fine shall be reversed generally; and for the defendant a precedent was shewn in 7. *Eliz.* that it shall be reversed *quoad* the *feme* only. But there the case was, That the *baron* and *feme* levied a fine, the *feme* being within age, and the *baron* died, and she took a second husband; and they brought writ of error, and the fine was reversed *quoad* the *feme* only, and her heirs.

And now it was argued by EGERTON and GOLDING of *Gray's-Inn*, that the fine shall be only reversed *quoad* the *feme* and her heirs, and shall stand good against the *baron*; for it may be that the land was the inheritance of the *baron*, which he might lawfully convey, and that the *feme* was joined only to bar her dower; or that they were joint-tenants before marriage, so he might well give his part. And if it were the inheritance of the wife, yet he might dispose of it during his life; and it shall not be reduced to him against his own act.

COKE and ATKINSON *contra.* It shall be intended the inheritance of the wife, if the contrary be not shewn, as in *Pigot's Case*, *antea.*

WRAY, C. J. When *baron* and *feme* join in a fine, it shall be intended the inheritance of the wife, and not that they are joint-tenants, or tenants in common. And if the fine shall be reversed only as to the inheritance, where shall the freehold be, and to whom shall the conusee be attendant?

GAWDY, *Justice.* This matter being dubious, the Court shall intend it to be rather the inheritance of the wife than otherwise; and the fine being the foundation of the conveyance, it being reversed, all shall be restored; as the case in *Littleton*, sect. 666. The

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K

baron

A husband and wife levy a fine; and the wife being within age, they brought a writ of error jointly to reverse the fine. Adjudged that it shall be reversed *in toto*, and not *quoad* the wife only.

Ante 115. 124. Post. 216.

1. Roll. Abr.

748.

2. Co. 77. b

57. a.

Cro. Jac. 482.

3. Lev. 38.

Hobart, 2.

Plowd. 414.

Co. Lit. 112. 331.

1. Leon. 114.

F. N. B. 21.

Owen, 21.

Bro. Fin. 29.

Bro. Err. 28. con.

Gilb. Uses, 41.

Dougl. 43.

CHARNOCK
and his
WIFE
against
WORSLEY.

baron discontinues the land of the *feme*, and takes an estate to him and his wife; the wife is remitted, and so is the husband, though he cannot say so; for she cannot be remitted, but the husband must be also remitted, for they are one person; and this fine shall be reversed in all; for it is error in law of the court, and the *baron* by the fine giveth nothing divided from the *feme*. And all that passeth from the wife shall be reversed in all, for the conveyance is in law erroneous. As if a man confess an action which is erroneous, yet against his own act he shall avoid it by error; and if it shall be reversed *quoad* the *feme* only, then it shall be a fine levied by the husband only; and so it will be a discontinuance at the common law against the wife, which is not reason; and by the reversal of the fine, a particular interest cannot be given to the conusee. And if this fine shall stand to bind the *baron*, then the *baron* cannot join in the writ of error; for a man cannot bring an action to reverse that which binds him; but all the books are, they shall join in a writ of error.

WRAY, C. J. The *baron* giveth no more than the wife giveth with him; and this was error in Court, to receive the fine; and if the fine shall be reversed, but *cessabit executio* during the life of the *baron*, then the wife shall not be restored to her inheritance living the *baron*, which is not reason; and here is no mischief to any; for if the conusee had made a feoffment, *scire facias* shall issue against him, in which he may shew and plead, that it was the inheritance of the *baron*, and the conusee might have pleaded it; and if he doth not, the Court will not help him.—And it was afterwards adjudged that the fine shall be reversed *in toto*. And WRAY, C. J. said, he had conferred with divers other Justices, and they were of the same opinion.

CASE 2.

Roger Windham against Ed. Clere.

Action upon the case lies against a justice for issuing his warrant to apprehend a man for felony, without any accusation against him.

- 3. C. 1. Leon. 137.
- Vent. 47.
- 2. Keb. 572.
- 2. Bull. 343.
- 1. Com. Dig.
- 170. 159.
- Cowp. 172.
- Dougl. 360.
- 1. Term Rep.
- 535.
- 2. Hawk. 132.

ACTION upon the case. And declares, That the defendant was a justice of peace in the county of N. And whereas the plaintiff was a loyal subject, &c. the defendant maliciously intending to deprive him of his good name and fame, did direct his warrant, and shews it in certainty, &c. to divers constables to attach him; alledging he was accused of the stealing of the horse of A. B. by reason whereof he was arrested, till he put in bond to appear, &c. *ubi revera* he was never accused, nor did steal the horse, and the defendant did know him to be guiltless; by reason whereof he was greatly discredited. Upon *non culp'* pleaded, it was found for the plaintiff.—And it was held by CLENCH and GAWDY, the action was maintainable. If a man be accused to a justice of peace for an offence, for which he causes him to be arrested by his warrant, although the accusation be false, yet he is excusable: but if the party be never accused, but the justice of his malice and own head cause him to be arrested, it is otherwise. And they commanded judgment to be given for the plaintiff, 14. Hen. 8. (a).

(a) In the case of *Morgan v. Hughes*, 2. Term Reports, 225. this case is denied to be law. The action should have been *trespass* and not *case*; for the injury is *immediate*

and not *consequential*. This is a settled distinction. 11. Mod. 189. Ld. Raym. 1402. 3. Bl. Com. 123. Strange, 635.

Havithbury

Havithbury against Harvey and his Wife.

CASE 3.

DEBT upon the 5. Eliz. c. 2. f. 12. And demands ten pounds, A *feme covert* for that he served a process upon the *feme* as a witness, and tendered to her sufficient charges, &c. and she appeared not, &c. and upon issue joined, it was found for the plaintiff.—And it was alledged in arrest of judgment, that he doth declare, that the non-appearance was to his damages, and sheweth not what damages. Also that a *feme covert* is not within the statute, and the charges ought to be tendered to the *baron*; for the charge lieth upon him.—**LEWIS:** The action is not brought for the damages which he had by her non-appearance, but for the ten pounds given by the statute.—Secondly, a *feme covert* is within the statute; for she may be the sole witness.—Thirdly, she is the person punishable for not coming, and the tender therefore is to be to her: and the plaintiff had judgment.

within the
5. Eliz. c. 9.
Cro. Car. 522.
540.
Wm. Jones, 430.
March 18.
5. Mod. 355.
Comb. 449.
1. Salk. 206.
Douglas, 560.
2. Bac. Abr.
294.

Hoe against Marshal.

CASE 4.

Hilary Term, 30. Eliz. Roll 788.

DEBT upon an obligation. The condition was, That if *Osbert Fuller* shall not appear at the next court in *Thetford* to answer to the plaintiff, &c. if then the said *Osbert* before the first day of *October* found surety to answer, that then, &c. The defendant pleads, that the said *Osbert* did appear at the next court. The plaintiff replieth, that he did not appear, *et de hoc ponit se super patriam*; and upon this issue was joined, and found for the plaintiff.—And it was alledged in arrest of judgment, that this was mis-tried; for it shall be tried by the record, and not *per patriam*; for every appearance is upon record.—But **THE COURT** held the trial good; for it appeareth not that he appeared, and that his appearance was upon record; but his plea is, that he appeared at such a day in the court, which may be, and his appearance not entered; and yet by it his bond is saved, and he himself doth not conclude, *preut apparet de recordo*. And **WRAY** said, that appearance at such a day may be tried *per pais*: but appearances generally shall be tried by the record. And **GAWDY** said, if it be mis-tried, it is aided by the statute 32. Hen. 8.—And it being the next term moved again, and a rule given, if the cause be not shewn the next day, that judgment be for the plaintiff.

An issue whether the obligor of a bond appeared in court upon the day mentioned in the condition shall be tried *per pais*, and not by the record.
Post. 579.
Co. Lit. 6.
5. Bac. Abr.
214.
3. Bl. Com. 336.

Piers against Hoe.

CASE 5.

TRESPASS. The case upon special verdict was, That a woman who was tenant for life as a jointurefs, takes a second husband, and they by deed convey the land to *Clerke* and his heirs, *habendum* to him and his heirs, to the use of him and his heirs for the life of his wife only; and the question was, If this were a forfeiture? And it was argued by **POPHAM** for the plaintiff, and **COKE** for the defendant.—**GAWDY** held it no forfeiture, and that the words "for the life of the wife" shall refer to both. For in construction of a deed, where the words are doubtful, reasonable construction

Tenant for life jointurefs takes a second husband. They convey to the use of A, and his heirs, for the life of the wife only. This is a forfeiture within 11. Hen. 7. c. 20.
Post. 407.

1. Roll. Abr. 854. 1. Leon. 125. 8. Co. 44. 2. Bac. Abr. 497. 1. Wood's Con. 32.

**Piers
against
Hoe.**

shall be made; and when words are in a deed to express the parties intent, they shall not be taken as void; and here the words "for the life of the wife" are put in to exclude the forfeiture, and to save the estate. And of this opinion were WRAY and SCHUTE upon the first motion, but CLENCH *contra*.—But at another day it being moved again, GAWDY held his former opinion; but WRAY and the other Justices held it a forfeiture. For WRAY said, by the deed at first a fee simple did pass, and that to the use of the feoffee, then the estate and the use are several things, and cannot be coupled to the words "for the life of the wife." And WRAY said, he had demanded the opinion of the Justices of his house, and they held it clearly a forfeiture in the words, and that the words "for life, &c." shall refer only to the use: and it was so adjudged.

CASE 6.

Ordeway against Parret and Halfey.

If the principal pay the sum recovered, the bail shall be excused; but it cannot be pleaded to a *scire facias* unless satisfaction is entered on the record.
Post. 233.

SCIRE FACIAS brought against the defendants, who were bail upon a bill of debt brought against *Bennet*; who pleads, that the principal had paid the money in which he was condemned to the plaintiff, according to the condition of the recognisance.—**PER CURIAM** it was ruled no plea without pleading payment of record. For it was said, that the condition is, that the defendant shall satisfy the debt, otherwise the sureties would do it. And this is to be understood of the most sufficient satisfaction which is of record; and therefore they disallowed the plea, and would not suffer it to be entered, or to be demurred upon; and did command GERARD, who pleaded the plea, to plead another plea; otherwise a *nihil dicit* shall be entered.

2. Lev. 212.
1. Roll. Abr.
335.

1. Mod. 24. 1. Vent. 49. 1. Bac. Abr. 218. 2. Term Rep. 576.

CASE 7.

Watkins against Ashwicke.

Where tender by a stranger is void.

NOTA by COKE, that it was adjudged, *Trin. 27. Eliz.* between the said parties, that where one tendered money upon a mortgage for an infant, who was not guardian, nor was to have any interest in the land, that it was adjudged a void tender.

1. Leon. 34.
Ow. 137.

Moor, 222. Co. Lit. 206. b. 9. Co. 106. a. 5. Bac. Abr. 4. 3. Will. 527.

CASE 8.

De Bavoy against Hassal.

In *assumpsit* for work and labour, on a promise to pay on request as much as would content him, neither the time or place of the request need be shewn.
Ante 74.

ASSUMPSIT. The plaintiff declared, that in consideration the defendant had retained him to go from *London* to *Paris* in *France* upon his occasions, he assumed to give him so much as would content him; and alledged that he went thither, and was content to take five-and-twenty pounds for his labour; and at such a place he requested the defendant to pay it, which he refused.

COKE moved in arrest of judgment, that he shewed no time or place when he gave notice of his contentment, and therefore was not good; for it hath been adjudged, that where one doth promise to give another twenty pounds upon request, and because no place was alledged of the request, the judgment after verdict was stayed.

GAWDY, *Justice*. The ground of this action is the *assumpsit*, but this cannot be certain without the party's declaration. So the notice

Ld. Raym. 132.
2. Term Rep.
29.

notice is to make the certainty of the duty, but not to inforce or impeach the promise; and in the case alledged, the *assumpsit* is nothing without request. But here being only a conveyance, the certainty of the time and place is not necessary: but this general form will serve, for it is but inducement; for the contentation is not the cause of the action; as the case in 39. *Hen.* 6. in debt against a successor of a parson for an annuity granted by his predecessor, *pro consilio impenso et impendendo*; and declares, that he gave counsel as he ought (otherwise the action lay not), but shewed no place where, yet good.

WRAY, C. J. accords; for the place where he was content is not material, nor issuable; for none can try it but himself. Also it is remedied after verdict: and it was adjudged for the plaintiff.

DE BAYON
against
HASSAL.

Finymore against Sanky.

CASE 9.

Michaelmas Term, 30. & 31. Eliz. Roll 174.

DEBT for seven pounds thirteen shillings and fourpence. Upon *nihil debet*, the jury found that the defendant did owe six pounds thirteen shillings and fourpence, but spoke not of the other twenty shillings.—And this was assigned for error, that the verdict was ill, and not remedied by the statute of 32. *Hen.* 8. c. 30. And for this cause it was reversed.

Salk. 133.

12. Mod. 5. 1. Vent. 27. Cro. Jac. 328. Co. Lit. 227. 3. Leon. 82. Hard. 166. 239. Sayer, 36. Stra. 1089. 844. 887. 2. Ld. Raym. 1520. Cowp. 706. Dougl. 666. 1. Term Rep. 239. 447.

Arundel against Short and his Wife.

CASE 10.

Michaelmas Term, 30. & 31. Eliz. Roll 434.

ERROR, upon a judgment given in trespass by *baron* and *feme*, of their close broken and corn carried away.—Error assigned, that *feme* ought not to join, for she can have no property in the corn. 48. *Edw.* 3. pl. 18. 9. *Edw.* 4. pl. 52. In personal actions they cannot join.

Husband and wife cannot join in trespass for carrying away corn.
Sed vide ante 96.

GODFREY and COKE *contra*. It is in the election of the *baron* to join his wife in personal actions; and it may be intended that they were joint-tenants of the corn before coverture, or that the *feme* had it as executrix; and if the writ by any intendment may be good, it shall not abate.

GAWDY. The books agree, that for personal things they cannot join; but for personal things in action, it is in the election of the husband to join his wife, or not.—And *Trin.* 31. the judgment was reversed. *Vide* 21. *Hen.* 6. 30. 14. *Eliz.* *Dyer*, 305. 7. *Hen.* 7. 2.

Vide ante 96.

Musket against Cole.

CASE 11.

ASSUMPSIT. And declareth, that in consideration the plaintiff had paid to the defendant forty pounds for the debt of *J. Musket* his son, the defendant assumed to deliver to him all the bills and obligations in which the said *J. Musket* was bound to him; and alledgeth *in facto* a request and denial to deliver, &c. and upon *non assumpsit*, it was found for the plaintiff.—And it was moved in arrest of judgment, that the plaintiff had not averred that

In an action to recover damages for the detention of bonds and bills, they need not be specially shown.

MUSKET
against
COLL.

that the defendant had any bills or obligations of the said *J. Musket* in his hands; and if he had none, the plaintiff was not damaged. 37. *Hen. 6. pl. 29.* 19. *Eliz. Dyer*; 356. & 297.

GODFREY for the plaintiff said, that when it is alledged, that he required the defendant to deliver them; in this it is implied, that he had some bills, &c. and the plaintiff need not shew them specially,

GAWDY, *Justice*. The plaintiff is not to recover the bills, &c. but only damages, and so need not alledge what the deeds were; as the cases in 47. *Edw. 3. pl. 3.* and 46. *Edw. 3. pl. 4.* the difference taken where he is to recover damages, and where the land. And here it may be given in evidence what bills, &c. he had: and the plaintiff had judgment.

CASE 12.

Knight against Jermin.

See the Commencement of this Case, ante 70.

An action on the
case will lie
against one per-
son for a mali-
cious prosecu-
tion.
Ante 70.

IT was now moved again by COKE. And he said, this malicious intention and endeavour before the bill exhibited, is to be punished, although the indictment was lawful to be preferred by any one for the queen. The words here, and in a conspiracy, are all one; and as a writ of conspiracy lieth against two, so here against one; and it is here alledged to be done maliciously. And here he caused the indictment to be written before he came into the court, which is not the office of a witness; and where malice is, his oath doth not excuse him; but if he had done it by the command of THE COURT, it had been otherwise. 21. *Edw. 3. 17. 7. Ass. 12.* 20. *Hen. 6. 5.*

GAWDY, *Justice*. If the defendant did it upon good presumptions, he ought to plead them; as that he found him in the house, &c. or the like cause of suspicion; but no such thing is pleaded, otherwise every one shall be in danger of his life, by such malicious practices.

WRAY, *Chief Justice*, agreed.

F. N. B. 114.
Cro. Jac. 131.
357.
1. Roll. Abr.
111.
2. Roll. Abr. 77.
Cro. Car. 15.
9. Co. 56.
1. Hawk. 347.
347.
Ld. Ray. 378.
1169.
Stra. 193.
3. Bl. Com. 136.

Wood's Inst. 414. 1. Term Rep. 493. 535. 548. 2. Term Rep. 215.

Trinity Term,

135

31. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*

Sir Francis Gawdy, *Knt.*

John Clench, *Esq.*

Robert Schute, *Esq.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

} *Justices.*

Brooke against Doughty.

Hilary Term, 31. Eliz. Roll 798.

CASE 1.

ACTION for words, for calling him "a perjured person, and that he was forsworn in the court of requests, and that he shall stand upon the stage." The defendant pleads not guilty; and it was found, that he spoke none of the words but "that he was forsworn in the court of requests." And the question was, If these words were actionable?—COKE moved, that for saying a man is forsworn, no action lieth. And in *Trin. 28. Eliz.* between *Herne and Haxe*, for saying "he was forsworn in the court of *Whitchurch*," no action lieth. And in this term in the common pleas, between *Samms and Cowbolt*, which is entered, *Trin. 28. Eliz. Rot. 636*, for saying, "he had proved him forsworn in the queen's bench," no action lay.—But THE JUSTICES (WRAY being absent) held the action lay. And for the case of *Whitchurch*, GAWDY said, the reason was, because it is a base court; of which this Court shall not take cognizance. But the court of requests is a court of which this Court shall take cognizance.—And in *Mich. 31. & 32. Eliz.* the case was moved again; and by consent of WRAY, judgment was given for the plaintiff, but the damages were abridged.—NOTA. DANIEL shewed a precedent, which was *Trin. 23. Eliz. Rot. 882*. between *Foster and Thorne (a)*, that for these words, "Thou wert falsly forsworn in the star-chamber," an action did lie.

To say of another that "he was forsworn in the court of requests," imports perjury. Post. 297. 391. 492. 573. 693. 783. 905. Cro. Jac. 120. 1. Com. Dig. 178. 1. Leon. 127. 1. T. Rep. 733.

Toft against Tomkins.

Trinity Term, 30. Eliz. Roll 528.

CASE 2.

THE case upon special verdict was, There was grand-father, father and son; the grand-father tenant for life, the remainder to the father in tail. The grand-father maketh a feoffment to the use of himself for life, remainder to the father in fee; then the grand-father and father infeoff the defendant. The question was, If this were a discontinuance? COKE for the plaintiff, and GODFREY for the defendant.—GAWDY and SCHUTE held it clearly a discontinuance; for when the father in remainder enters to make a feoffment, he is remitted by reason of the forfeiture committed before; and by this had gained the possession, and it is only his feoffment, and so a discontinuance; for both cannot have possession. CLENCH contra. For the intent of his entry was to join with the other; and his intent appears, that his and the grand-father's estate shall pass together; and this explaineth it, that he will not enter for forfeiture, and so is no discontinuance. *Et adjournat' absente WRAY.*

A discontinuance cannot be committed by a tenant in tail, who has never been seised by force of the entail. Post. 827. Co. Lit. 339. 347. 1. And. 44. 1. Leon. 127. 1. Roll. Rep. 188. 3. Com. Dig. 77. Cowper, 702. 1. T. Rep. 733.

CASE 3.

Boyton *against* Andrews and Simpson.*Hilary Term, 30. Eliz. Roll 156.*

What request is sufficient for the performance of a covenant.

1. Wood's Cop. 394. 440.

DEBT upon an obligation. The condition was to make an assurance to the obligee of certain land before the 10th *March*, 17. *Eliz.* and if it fortune that the obligee refuse to accept the assurance, and shall make request to have 100*l.* in satisfaction of it; then if upon such request within *five months* after he pay the 100*l.* that then, &c. At the day he refused the assurance, and afterward, 27. *Eliz.* he maketh request to have the 100*l.* If this request were sufficient for the time? was the question upon demurrer.—Upon motion without argument, the opinion of *THE JUSTICES* was, that a request at any time, during his life, was good; and he is not restrained to make it at or before the day the assurance was to be made. And judgment was for the plaintiff.

CASE 4.

Coteford *against* Pease.

It is a good *modus* for one parish to pay tithe for pasture to the vicar of another parish, &c.

1. Eq. Caf. Ab. 367.

Fitz. 110.

2. Peer Will.

572. Dougl. 204, 205. 1. Term Rep. 427.

PROHIBITION. The plaintiff sueth the defendant for tithes in specie of certain pastures in *N.* where he was parson. The defendant to have a prohibition surmifeth, that he was an inhabitant in *S.* and that time out of mind every inhabitant there that had pastures in *N.* had paid tithes for them to the vicar of *S.* and that the vicar of *S.* had paid to the parson of *N.* two-pence for every acre.—*THE COURT* held the prohibition did lie, and that the plaintiff shall declare, and the defendant may demur to it if he will; for it is as if he had prescribed to pay two-pence for every acre,

CASE 5.

Botham & Cooper *against* Lady Gresham.

Prohibition. Ante 71. Post. 306.

PROHIBITION. That she sued them in court christian for tithe hay; and surmifed, that time out of mind they had paid to the vicar there four-pence for the tithe hay of every acre.—*COKE* moved, this was not good, for here *modus decimandi* shall not come in question; but he ought to plead it in the spiritual court, that it appertains to the vicar, and not to the parson; and if the vicar sue for tithes, there *modus decimandi* shall come in question.—And a consultation was granted. *V. Casum præcedent.*

CASE 6.

Gomerfal *against* Bishop.*Hilary Term, 31. Eliz. Roll 751.*

A variance between the suggestion and the declaration, in prohibition, is fatal to the whole proceedings. Cowper, 178. 1. Term Rep. 427. 656.

A discharge from tithes may be by parol. Post. 158.

Cro. Jac. 337.

PROHIBITION. The plaintiff surmifed, that he sued him for tithe of hay, whereas there was an agreement between them, that for the sum of seven shillings *per annum* he promised him, that he should have the tithes of this land for his life: and in his declaration he said, that for this sum the defendant let him his tithes for life.—And for this variance *THE COURT* held all to be ill, for the surmise is as the writ; and if there be variance between the surmise and declaration, all is ill.

GODFREY said, it had been ruled in *Pendleton v. Hunt* (a), that an agreement between the parson and the parishioners was a good cause to grant a prohibition, for the spiritual court cannot try it: and they will not allow the plea.

3. Burr. 2873.

(a) 1. Leon. 128.

Stedman's

Stedman's Case.

CASE 7.

STEDMAN was indicted upon the 5. Eliz. c. 9. for perjury; and the judgment was, That he was examined upon certain articles in the star-chamber, and that *falsè et voluntariè deposuit*; and shews not in what matter he swore falsely, nor in what action; and the oath was in the star-chamber in *Middlesex*, and the indictment in *Stafford*. And he was discharged.

An indictment for perjury must shew in what cause the party was sworn.
Post. 148.
Doug. 156.
1. T. Rep. 69.

Richard Thomas's Case.

CASE 8.

HE was indicted upon the 5. Eliz. c. 9. for perjury; and recited the statute, That if any be sworn, &c. in any court of record, whereas the statute doth mention them specially, &c. Also that *apud castrum Lincoln. falsè deposuit*, and shews not in what county the castle was, &c. And it wanted the conclusion, *et sic falsè et voluntariè perjurium commisit*, &c. And he was discharged.

The statute of perjury must be strictly pursued.
Ante 105.
Post. 147.
2. Leon. 211.
214.
2. Hawk. 321.

Sho. 190. Sav. 43. Holt, 534. Skin. 403. 1. Hawk. 323.

Lenthal's Case.

CASE 9.

LENTHAL was indicted for the murder of *Coke*; and the words were, *Inquisitio capta apud Hereford, &c.* but shewed not in what county *Hereford* was, which should be of necessity; for the coroner or justice of the peace cannot take an inquisition out of their jurisdiction. Also it shewed not the place where the stroke was given.—And for these causes the indictment was held to be void.

An indictment must shew in what county it was taken, and where the offence arose.
Post. 606. 738.
751.

2. Hawk. 259. 265. 314. 362. 3. Bac. Abr. 101. 1. T. Rep. 69.

Goslen's Case.

CASE 10.

GOSLEN was indicted for the murder of *Marsum*; and the indictment was, That *percussit in brachia sua dextra*.—*COKE* moved, that this was *falsè Latin*, and without sense, or certainty where the stroke was, and shewed not where the party died of the stroke; for it was, "and so of it *eo instante die obiit*."—And the opinion of THE COURT was, that it was vicious.

Indictment quashed for bad Latin.
Co. 5. 121. a.
Post. 231.

Kirkby against Coles.

CASE 11.

Hilary Term, 31. Eliz.

ASSUMPSIT. And declared, that whereas a certain communication was between him and *Cooper*, for the masting of certain hogs for the plaintiff; in consideration that the plaintiff gave to *Cooper* three shillings for every hog well masted, the defendant assumed that they should be well fatted, and re-delivered to him; to which promise he giving credit, did deliver to *Cooper* one hundred and fifty hogs to be masted; and for that fifty of the hogs which were not re-delivered to the plaintiff, he brought his action.—After verdict, *TREDWAY* did alledge in arrest of judgment, that there was no consideration to charge the defendant, for he had no benefit. But *GODFREY* alledged for the plaintiff, that the promise was the cause of the contract, and being made at the time of the communication it shall charge him; otherwise perhaps, if it were made at another time. And it was adjudged in *Smith v. Edmunds*, where two merchants were indebted one to the other, and

Where mutual promises are made at the same time, an *assumpsit* will lie.
Post. 703.

Hob. 88.
2. Jones, 168.
1. Leon. 186.
Cowp. 290.

Ante 42.

KIRKEY
against
COLES.

and they agreed to deliver all their bills and bonds into the hands of the defendant, he did assume, that he would not deliver them till all actions were determined between them; and notwithstanding he had delivered to one of them, and the other party brought his action, and it was adjudged maintainable, yet he had no benefit by keeping of them: yet that was not material; for the action was grounded upon the promise and deceit: so here.—And of that opinion were WRAY and CLENCH, because the promise was at the time of the communication. GAWDY, *Justice*, was of the contrary opinion.

CASE 12.

Assumpsit will lie on a promise to assure land, though made after the sale.
Ante 94.

Leon. 297.

1. Com. Dig.

142. 1. Bac. Ab. 170.

Warcop against Morfe.

ASSUMPSIT. And declares, that in consideration he had bought of the defendant three parcels of land upon the 10th December, he afterwards, viz. 19. December, assumed to make him a sufficient assurance thereof before such a day. After verdict, GODFREY moved, that the consideration was executed.—But it was adjudged for the plaintiff; for the assurance was the substance of the sale and matter.

CASE 13.

The Attorney General cannot enter a *nolle prosequi* to an action *qui tam*, except for the King's part of the penalty.
Post. 583.

2. Roll. Rep.

136

21. Co. 65. b.

3. Inst. 194.

2. El. Com. 437.

1. Hawk. P. C.

c. 85. f. 21.

2. Hawk. c. 26.

f. 64.

Cowp. 611.

Dougl. 239.

Stretton against Tayler.

INFORMATION upon the statute of usury, *tam pro seipso quam pro regina*. The queen's Attorney entered a *non vult prosequi*, and this was now pleaded in bar against the informer for all; and it being moved in court, WRAY held it should be no bar. But POPHAM, Attorney, alledged, that it cannot be found in any record, that the party had proceeded, when the Attorney had entered a *non vult prosequi*. For they do it not without great consideration, when the information had long depended, and nothing done in it; and it is entered for the ease of the subject, that he should not be grieved without cause; and it is not against reason, that in personal suits the act of the one plaintiff should prejudice the other. And here the queen is the principal and first named; and if it were *pro domina regina tantum*, it is clear she might discharge it; and the replication shall be in the Attorney's name only; and therefore, after plea pleaded, the queen is only party in a manner. And it was adjudged within these eight years, that if the informer be non-suited, the queen cannot proceed; and by the same reason, where the queen will not proceed, it bars the party; and the records of all times warrant it.—But at another day it being moved again WRAY said, they all held that the entry was no bar to the party; and that upon conference, ANDERSON and MANWOOD were of the same opinion, that the party is not barred by the queen's not proceeding; for in that the law giveth the party the moiety, the queen cannot discharge it. And WRAY and GAWDY denied that the non-suit of the party did bar the queen.—And it was afterwards ruled that the party is not barred by this entry. 11. Co. 65. b.

CASE 14.

Perry against Soam.

Michaemas Term, 30. & 31. Eliz. Roll 482.

A prescription in *non decimando* for green tares

PROHIBITION against the defendant, parson of the church of Sherring in Essex, for that he had libelled in the spiritual

cut before they are ripe, and given to *milch kine*, and *draft cattle*, is good; but a *modus* to pay so much

for every *calfe*, *lamb*, *sheep*, in lieu of tithe for all *dry cattle*, *sheep*, and *wool*, &c, is bad. 2. Leon. 27.

Bunb. 279. 2. Ld. Ray. 1159. 3. Com. Dig. §2. 90.

PERRY
against
SOAM.

court for tithes of green tares eaten before they be ripe; for tithes of herbage of dry cattle; for tithes of sheep bought or sold; and for churchings and burials. He surmised, as to the green tares, that in the said parish they had not sufficient meadow or pasture for their draft cattle and milch kine; and in consideration thereof they had used time out of mind, &c. to pay the tenth shock of their ripe tares; but for the green tares which were eaten before they were ripe, in consideration they gave them to their cattle, they were discharged of tithes for the same.—As to the herbage for dry cattle, he surmised, that every parishioner there who had milch-kine and calves under the number of seven, shall pay for every calf he rears one half-penny; for every one they kill one penny; for every one they sell the tenth penny; and if he have seven or above, to give one in satisfaction of tithes of them and all dry cattle.—As to the tithes of sheep bought or sold, he surmised, that they paid for the lamb one half-penny, and for the wool and fleece of the sheep one penny; and for all sheep bought or sold between the *Lady-day* and *Lammas*, to pay four-pence; and to the residue of the year faith nothing, nor to the churchings and buryings: and for that it was clearly held ill.—And to the first, COKE said it is no good surmise; for he may as well prescribe to be discharged of hay given to his cattle, and it is a prescription *in non decimando*; and he doth not prescribe for all tares, but for those given to his cattle; and hath not averred they were given to his cattle; so pursueth not his prescription, as 10. *Edw. 4. pl. 2.* is that he ought. To the second surmise, it is not good; for he alledgeth not that he had calves; for if he hath no calves but dry cattle he pays nothing, and it is uncertain whether he shall have calves or not; so it is an uncertain thing for a certain duty. And last term it was ruled in the *Lady Gresham's Case*, where one prescribed to pay yearly by the hands of two persons inhabiting in such houses, four-pence to the vicar in satisfaction of all tithes, it was adjudged ill; for the houses may decay, or none live in them; so nothing shall be paid.—As to the first, the Court held it a good surmise; for WRAY, *Chief Justice*, said, the matter is the want of meadow and pasture; and if he had said, for want of meadow and pasture they had use to eat their meadows with their cattle, and for so much as they did eat to pay no tithes, it had been good. But for the second, the not averring he had calves, this cannot be good; and the others are not to be defended. Therefore for all, except the first, consultation was granted; and for that they would advise.

Cro. Jac. 47.

English against Pellitory Tayler & Smith.

CASE 13.

Michaelmas Term, 30. & 31. Eliz. Roll 521.

TRESPASS for assault, battery, and wounding. Two of them pleaded, that they were lessees of certain lands; and there were certain posts upon the land, and the plaintiff would have taken them away, and they gently took them from him, &c. The third pleaded, that he came and found them contending for the posts, and he parted them, *molliter* laying his hand upon the plaintiff. The plaintiff replieth, *de injuriis suis propriis absque tali causa*; and found for him.—HARRIS moved, that this was no issue; for the

The replication,
"de injuriis suis
"propriis absque
"tali causa,"
to two several
justifications,
by different de-
fendants, in the
same action,
held good.

1. Leon. 124. 1. Salk. 218, 219.
plain-

ENGLISH
against
PELLITORY
TAYLER &
SMITH.

plaintiff ought to have made several replications, and *absque tali causa* can be no issue to all.—THE COURT said, though it be no good form of pleading, yet by reasonable construction these words *absque tali causa* being *nomen equivocum*, shall be referred to every cause; and so the pleading shall be maintained: and judgment was given for the plaintiff (a).

(a) See 4. & 5. Ann. c. 16.

CASE 1.

Sir Thomas Cecil against Harris.

In the Common Pleas.

Trinity Term, 29. Eliz. Roll 823.

H "levy per
distress et sic
non detinet"
be pleaded to
debt for rent,
and it be found
the rent was
paid, but not
by distress, the
verdict is for the
defendant.
Post. 157. 209.
634.

Cowp. 766.
Doug. 666.
1. Term Rep.
236. 659.

DEBT against the defendant as executor for the arrearages of rent in time of the testator. He pleaded *levy per distress & sic non detinet*. Upon issue joined, it was found by verdict, that a stranger who was the assignee of the term, by the executor, had paid the rent to the plaintiff, who had accepted it; but no distress was taken for it: and, If the plaintiff should have judgment upon this plea? was the question.—ANDERSON, PERIAM, and WYNDHAM, held clearly, that judgment shall be against the plaintiff; for the substance of the plea is found with the defendant; for it is found the rent is paid; so *non detinet* the rent; and the substance is upon the *non detinet*, and not upon the *levying by distress*.—WALMSLEY held strongly the contrary, that the substance of the plea is upon the levying by distress; and if it be found it was not levied, the residue is not material; for this is the matter traversable; and upon this is the issue, and so is 4. Hen. 6. and 33. Hen. 6. But the other Justices clearly against him; and ANDERSON denied the book of 4. Hen. 6. and said other books are against it.

CASE 2.

Sutton's Case.

In ejectment
by a lessee against
a lessor, if the
jury find speci-
ally that the les-
sor had no in-
terest in the
land demised,
yet the plaintiff
shall have judg-
ment; for a jury
may find an
estoppel on the
general issue.
Ante 37.
Post. 309.

Co. Lit. 227. a.
Owen, 96.
Cro. Car. 110.
2. Co. 4. b.
4. Co. 53. a.
1. Leon. 206.
2. R. Ab. 690.
1. Saund. 327.
1. Salk. 276.
3. Bac. Ab. 441.

EJECTIONE FIRMÆ. And declares of a lease for years made to him the plaintiff by the defendant himself. Upon not guilty pleaded, the jury found a special verdict, that the defendant had nothing in the land when he made the lease to the plaintiff; and that afterwards he entered upon the plaintiff; and the jury finding the whole matter at large, the question was, If his entry was lawful?—ANDERSON and PERIAM held clearly, that the plaintiff shall recover; for this is a good lease, and interest between the parties, so that the lessee may enter, and the other cannot put him out; and when he hath right and interest, he may have his action; and this may as well be found by the jury, though but a matter of estoppel, as any other matter. And ANDERSON said, it hath been adjudged, if A. levy a fine to B. of his own land for years, and B. is ousted, A. shall have an assize; and they said, the jury in any case are bound to find an estoppel: and in *Pleadal's Case*, because they would not find an estoppel, they were attainted.—WALMSLEY held the contrary; for being a matter of estoppel, and the jury being sworn to find *veritatem facti*, they shall not find an estoppel; and the jury having found the matter at large, and the truth appearing to us that the plaintiff had not right nor cause of action but by estoppel, we must judge

5. Bac. Ab. 315. Cowp. 601. 579. 1. Term Rep. 86. 701. 2. Term Rep. 171.

judge according to the truth of the matter. WYNDHAM seemed to agree with him, that it shall be adjudged according to the truth of the matter: and thereupon PERIAM said, they would know the opinion of other Justices; but said privily there was no great question in it.

SUTTON'S
CASE.

Marler against Wright and Green.

CASE 3.

Int. 30. & 31. Eliz. Roll. 803.

EJECTIONE FIRMÆ. The case was, Edmund bishop of London made a lease 6. Eliz. for twenty-one years of land part of his bishoprick, rendering the ancient rent, and afterwards was translated to York; and 17. Eliz. Edwin then bishop of London granted the land to three for their lives, rendering the ancient rent: the lessee attorneth, the dean and chapter confirm the lease. Edwin was translated to York, and John now bishop of London made a lease to the plaintiff. The question was, If the lease for three lives, being confirmed by the dean and chapter, was void to bind the successor by the statute of 1. Eliz. c. 19. the lease for years being then *in esse*?—And it was adjudged, that the lease for three lives did not bind the successor. And the principal reason was, that by the words of the statute, upon leases made by bishops, the ancient rent must be reserved, and yearly payable; and in this case, the rent reserved upon the grant for three lives in reversion, although it be due, yet the successor had no remedy for it, during the lease for years, by distress or by action of debt, being reserved upon a lease for life; nor by assise, for he had no seisin; and so it is not due or payable, according to the intent of the statute. And the plaintiff had judgment.

A bishop's lease for three lives concurrent with a lease for 21 years by his predecessor, is void.

Co. Lit. 45. a.
1. And. 193.
Moor, 253.
3. Lev. 439.
10. Co. 62.
3. Com. Dig. 251.
3. Bac. Abr. 347.

Smalwood and two others against the Bishop of Coventry, &c. and Marsh.

CASE 4.

QUARE IMPEDIT brought by the plaintiffs, as executors of William Sale, for not suffering them to present to the archdeaconry of Derby, which became void in the time of the testator, and belonged to him, and after his death to the plaintiffs, to present; and the writ and count supposed a disturbance to the testator in his life, *in nunc retardationem executionis testamenti prædicti*. And it was demurred upon it.—First, because the archdeaconry is yet void; and so they may have an action for the disturbance to themselves. Secondly, there is no such writ in the Register. Thirdly, here is a double disturbance, to the testator and to themselves. Fourthly, the disturbance to the testator is alledged to be *in retardationem executionis testamenti*, which cannot be; for in the time of the testator there was no testament. 25. Edw. 3. pl. 40. 4. This is not an action given by the equity of the statute of 4. Edw. 3. c. 7. 5. Fifthly, an archdeaconry is such a spiritual promotion for which an action lieth not; for it is a spiritual office and function, and hath no certain place to be inducted in; as 24. Edw. 3. pl. 42. where this question is glanced at there. Vide 50. Edw. 3. pl. 26. 39. Edw. 3. 21. 18. Edw. 3. 9.—And it was resolved, that the writ shall abate. ANDERSON said they were all resolved, that as the writ is brought, it shall abate; and yet they agreed that a special writ lieth in this case for the executors. And the principal reason of their judgment was, because the writ was *in nunc retardationem*, which cannot be of a disturbance in the life of the testator (a).

A *quare impedit* lies by executors for disturbance in presenting to an archdeaconry void in the time of their testators; but if they alledge it *in nunc retardationem* it shall abate. Post. 207.

Co. Lit. 344.

(a) See this case revived, Post. 207.

CASE 5.

Bond against Richardson.

Michaelmas Term, 30. & 31. Eliz. Roll 616.

Solvit ad diem is satisfied by proof of payment before the day.

1. And. 198.
Owen, 45.
1. Leon. 311.
Moor, 267.
Cro. Car. 284.
Cro. Jac. 435.
1. Bac. Ab. 426.
3. Bac. Ab. 710.
Co. Lit. 212. b.

DEBT upon an obligation. The condition was for the payment of a lesser sum at a certain day and place. The defendant pleaded payment at the day and place according to the condition; upon which they were at issue; and it was found, that he paid it before the day, and at another place, and the plaintiff accepted it; and, For whom this verdict was found? was the question.—ANDERSON, *Chief Justice*. It is no question, but it is found for the defendant.—And afterwards in *Mich. 31. & 32. Eliz.* it was moved again; and then ANDERSON said, they were all resolved to give judgment against the plaintiff; for payment before the day is payment at the day. And thereupon it was adjudged, that the plaintiff shall be barred. (a) *Vide 5. Eliz. Dyer 222. contra.*

(a) By 4. Anne, c. 16. s. 11. If the principal and interest be paid before action of the bond brought, it may be pleaded in bar, though

CASE 6.

Mills against Snowball.

A juror challenged and withdrawn, may be afterwards sworn.

Livery for part may be good for the whole.
Ante 95.

Co. Lit. 48. a.
1. Wood's Com. 514.

A limitation.
Ante 122.
Post. 359.

ENTRY SUR DISSEISIN. The parties being at issue, and the jury at the bar, one of the jurors was challenged by the demandant, and also by the tenant; and thereupon he was withdrawn. Afterwards, because there were not jurors sufficient, it was prayed that he might be sworn; and by the assent of both parties he was sworn by order of Court.—Upon evidence it was held, that if a feoffment be made of divers lands, and of a house in which the feoffor doth dwell, and delivers the feoffment in the house, and speaks nothing of the land, yet it is good of all; for they having an intent to give and take livery, this is a good feoffment; for they assembled there for that purpose.—It was held, that where one deviseth land to his wife for life, remainder to his son and heirs, and if he dieth before his age of twenty-one years, that then it shall remain to *J. S.* in fee, and dieth; the son levieth a fine, and dieth before twenty-one years; *J. S.* shall have the land after the death of the wife; for it is a plain limitation.

CASE 7.

Anonymous.

It is a good plea to an action of debt by an executor, that the plaintiff is an alien enemy.
Post. 683.

DEBT by an executor. The defendant pleads, that the plaintiff was an alien *nee* at Ghent, under the obedience of Philip king of Spain, enemy of the queen.—And it was held a good plea, though the action was brought as executor; and though no wars were proclaimed between this kingdom and Spain, by reason of open acts that he did as an enemy.

Co. Lit. 129. Owen, 45. Went. 15. Molloy, 870. Moor, 431. Carter, 49. 191. Skin. 370. Salk. 46. Ld. Ray. 242. 283. 835. Foster, 186. 2. Str. 1082. 3. Burr. 1739. 2. Bac. Abr. 376. Douglass, 641. 650. Gilb. on Wills, 383. 1. Term Rep. 84.

CASE 8.

Green's Case.

In hue and cry by a master for a robbery on his servant, the information must be given by the servant, and not the master.
Show. 94. 241.

ACTION upon the statute of Winchester, for that one Brook his servant was robbed; and alledges, that the plaintiff himself came before a justice of peace, and was sworn according to the 27. Eliz. c. 13. (a). After verdict, it was alledged in arrest of judgment, that the servant was to be sworn, and not the master.—And so was the opinion of THE COURT: for the servant might know the Cro. Car. 38. 336. Cro. Jac. 224. 1. Leon. 323. 3. Mod. 238. 289. Salk. 613. Carth. 146. 2. Hawk. P. C. 117. 2. Saund. 380.

(a) See 3. Geo. 2. c. 16. 22. Geo. 2. c. 24.

persons when the servant was robbed, and the master was not in company: and the intent of the statute is, that he that had notice shall be sworn. And thereupon the judgment was staid.

Bease against Draiton.

CASE 9.

DEBT upon an obligation. The condition was, that if J. S. makes an obligation to the plaintiff before Michaelmas, that then, &c. The defendant pleaded, that J. S. made the obligation, and sealed and delivered it to another as his deed, to the use of the plaintiff.—And it was adjudged, that it was no performance of the condition; for the meaning was, that it should be a good deed to the plaintiff, and perhaps the other will not deliver it to the plaintiff.

A condition to deliver a bond to the plaintiff, is not satisfied by the delivery of it to a third person to his use. Ante 54.

Cro. Car. 19. 77. Cro. Jac. 570. 1. Lut. 565.

Hare and others against Celey.

CASE 10.

Hilary Term, 30. Eliz.

TRESPASS for breaking their close called *Church-field*, and metes and bounds it. The jury find a special verdict, that the place WHERE was sixteen acres lying in a field called *Church-field*, and meted it by other metes and bounds that were mentioned in the new assignment, of which *Hare* was seised in fee, and *eas expedit* to the other three to sow at halves, *scil.* that he should find one half of the seed, and the other three the other half, and should manure the land; and that *Hare* should have one moiety of the grain there growing when it was reaped, and the others the other moiety; and after the land was sown, *A.* entered by the command of the defendant, and spoiled a great part of the corn. Upon which entry and spoiling, the action was brought.—First matter, If *Church-field* being found to be a great field, in which divers men had interest, if the sixteen acres in it may be called *Church-field*? And as to this THE COURT spake little.—Second matter, If this *exposing the land to half* be not a lease of the land, so as the action was to be brought in the name of *Hare* and the three?—Third, admitting it was a lease, if *Hare* be not tenant in common with them of the corn; for the moiety of that which was sown, was his?—THE COURT held it no lease of the land, but otherwise if it be for two or three crops: and therefore, as to the breaking of the close, *Hare* only was to bring the action; and as to the spoiling the corn, they ought to join, being tenants in common. But in that they joined in the action for breaking the close, whereas he ought to have brought it alone, it was adjudged the writ should abate.

"Exposing to half" is no lease; it is only a liberty to plough and sow, but passes no interest; nor can the party have trespass for breaking the soil; but if the tenant in fee had exposed it to halves for several crops, it had been a lease. Post. 170. 530. 554. 729.

Gouldf. 77. 1. Keb. 267. 1. Leon. 315. Cro. Jac. 384. Hob. 73. Cro. Car. 300. 2. Saund. 116. Jones, 360. Co. Lit. 198. 2. P. Will. 414. 3. Bac. Ab. 403. 5. Bac. Ab. 163.

Higgins against Mill.

CASE 11.

In the Court of Chancery.

THIS case was referred to ANDERSON and WALMSLEY out of the Chancery, this term. *Higgins* being possessed of a term, deviseth his term to *Elizabeth* his wife, and to *Edward* his son, for their lives; and after to *Humphrey* his son, and the heirs males of his body, and died. *Elizabeth* and *Edward* entered by force of the devise, and died. *Humphrey* sold his interest of his term, and had issue *John*, and died. *John* sued for the term.—And they certified their opinions under their hands, that *John* had no right to the lease. ANDERSON did not shew his reason. But WALMSLEY shewed his reason to be, for that *John* cannot claim it as heir-male, for that is not good to convey the interest of a term to him. *V. Leonard Love's Case*, 10. Co. ad finem.

A chattel real cannot be in-tailed. Co. Lit. 20. a. 10. Co. 87. b. 1. R. Ab. 837. 1. Ch. Rep. 200. 1. Vent. 194. 2. Ch. Rep. 233. 3. Ch. Caf. 30. Fearn, 345. 1. Peere Will. 290. 1. Bro. Ch. Caf.

Michaelmas Term,

31. and 32. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*Sir Francis Gawdy, *Knt.*John Clench, *Esq.*Robert Schute, *Esq.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*} *Justices.*

CASE 1.

Garrets against Fulwood.

The 5. Eliz. c. 23.
extends to causes
civil and criminal.
Cro. Jac. 197.

IT was held by THE COURT, that the 5. Eliz. c. 23. is to be intended not only of excommunication for criminal causes, but in any other suits there for legacies, probate of wills, tithes, or other cause there.

CASE 2.

Matthew against Hassel.

Michaelmas Term, 30. & 31. Eliz. Roll 49.

No day is given
in ejectment for
the writ of
enquiry.
Doug. 198.

ERROR of a judgment in *ejectione firmæ* of a house in London, where judgment was upon confession of the defendant.—First error assigned was, that a writ of inquiry of damages was awarded; and no day given to any of the parties to be there at the time of the return; for the entry ought to be, *Ideo dies datus est partibus prædictis*, or at least to the plaintiff; so that he might then pray his judgment.—*Sed non allocatur*; for the defendant is not to have day, and the plaintiff is to attend at his peril; and so is the course in the common pleas, but it is otherwise in the queen's bench.

"*Quod recuperet possessionem*"
is a good judgment in ejectment.

F. N. B. 220.
Co. Lit. 285.
Sevil. 28.

The second error, the judgment was, that *recuperet possessionem termini prædicti*, where it should be *quod recuperet terminum*, and so are all the books.—But THE COURT held it all one; for as in a real action, he is to recover seisin; so in a personal, he is to recover possession; and the writ is *habere facias possessionem*: and the judgment was affirmed.

3. Mod. 249. 5. Mod. 285.

CASE 3.

Long against Woodliffe.

Judgment shall
be given on a
confession of action
notwithstanding
an error in the
issue.
Post.

Cro. Jac. 435.

DEBT upon an obligation, which bore date in May, 30. Eliz. and it was for payment of a lesser sum in December, 31. Eliz. The defendant pleads payment in December, 30. Eliz. according to the condition; whereas it should be December, 31. Eliz. Issue was joined, *quod non solvit*; and at the *nisi prius*, the defendant did confess the action. *Scit' quod non potest dedicere actionem quin non solvet.*—HARRIS, *serjeant*, moved in arrest of judgment, that this being no issue, the confession that he had not paid, is not material; and so judgment cannot be given for the plaintiff.—But THE COURT held, that he having confessed the action, the words *quin non solvet* are not material, but surplusage; and it shall be adjudged upon his confession: and the plaintiff had judgment.

Hill

Hill against Tempest, and Rainsford against Mallet.

CASE 4.

Trinity Term, 31. Eliz. Roll 811.

ERROR of a judgment in the common pleas in trespass of battery; and this was after verdict.—First error. That the entry was, that the defendant appeared *per* HIGGINS, *attornatum suum*, leaving out his christian name.—Second error. That after the issue, and *distingas* awarded, the action being brought against Hill and J. S. J. S. died before the last continuance; and judgment was given only against Hill.—But to this last error it was held, that the writ should not abate, but it shall stand against the survivor; and that the issue was well tried, although only one of them was living. 4. Hen. 7. 7. 2. Eliz. Dyer 175. (a):

(a) Vide Post. 574. 625. 652. 1. T. Rep. 637.

Judgment against one defendant good, though the other died after issue, and before verdict.

1. Ld. Ray. 28.

See this case as to the first error, more fully reported, post.

153.

Hadman and Green against Ringwood.

CASE 5.

THE plaintiffs, as churchwardens of *Hotherston* in *Norfolk*, brought trespass for taking a bell out of the church in the time of their predecessors; and in truth it was in the time of *Edw. 6.* in the rebellion of *Kett* there: Upon not guilty pleaded, it was found against the defendant, and 50*l.* damages given.—*GODFREY* moved, that this action doth not lie by the successor of the church-wardens, for they are not incorporate by that name; but the predecessor by reason of his possession ought to bring the action, & *moritur cum personâ*. 19. Hen. 6. 6.—*COKE contra*, relied upon *F. N. B.* 91. & 8. *Edw. 4.* 6. for otherwise there is no remedy for the wrong; for the predecessor churchwarden cannot have action, his time being past: and so *prima facie* THE JUSTICES did conceive, for the successor shall have account against the predecessor (a).

Dalif. 105. 1. Leon. 177. Cro. Jac. 234. Dyer, 99. 5. Mod. 395. (a) Vide 2. Strange, 852. in point. 2. Peet Will. 126.

Churchwardens may maintain trespass for goods taken in the time of their predecessors.

Post. 179.

1. Hawk. 145r.

1. Hale, 512.

Dyer, 99.

2. Hale, 181.

Ld. Ray. 337.

11. Hen. 4.

pl. 12.

12. Hen. 7.

pl. 28.

2. Strange, 852. in

Dampport against Thatcher.

CASE 6.

ERROR of a judgment in the common pleas in an action of debt, and upon the judgment in the *scire facias* that issued upon it. The error assigned upon which the plaintiff relied was, that the judgment is entered, *visis præmissis videtur curiæ*, that the plaintiff shall recover his debt; and so much for damages and costs *de novo adjudicatis*; which was erroneous, for it is but a *videtur curiæ*, or the opinion of the Court, and no judgment by the Court, and then the judgment subsequent upon the *scire facias* is erroneous.—THE COURT held, that the first judgment was not erroneous, but that no judgment was given; and then the judgment in the *scire facias* is erroneous, and therefore they reversed that: but as to the first, there being no judgment, they could not judge upon it; and the party had no remedy upon it; for it cannot be remanded to the common pleas to have judgment there given, but he must commence his suit *de novo* (a).

(a) A second writ of error was brought in this case, and the opinion of the Court confirmed.

If the entry on the record be a *videtur curiæ*, a *scire facias* upon it against the bail is erroneous; and there being no judgment, the suit must be commenced *de novo*.

Post. 215.

2. Leon. 1.

Cro. Jac. 386.

Strange, 441.

1. Term Rep.

279.

CASE 7.

Lucy against Fisher.

Easter Term, 31. Eliz. Roll 311.

On an issue whether lands are holden of a manor, the *venire* must be from both places.

Sed vide Post.

Note (a) p. 260.

4. Bac. Abr. 391.

(a) Ante, 114.
Avowry in Replevin.

Hob. 108.

REPLEVIN, for taking his gelding in a close of five acres of land in *Sporly*. The defendant made consuſance as bailiff of *Philip Audley, Esq.* in the place WHERE; for that one *George Lether* was thereof ſeiſed in fee, and held them of the ſaid *P. Audley*, as of his manor of *Eastball* in the ſame county, by fealty and rent of eighteen-pence, and other ſervices, and for the ſaid rent arrear made conſuſance as bailiff of the ſaid *Philip*, as in thoſe lands held of him. The plaintiff traversed the tenure of the manor; and being at iſſue, it was found for the plaintiff.—**TANFIELD** moved in arreſt of judgment, that it was miſ-ried; for the iſſue being if the land in *Sporly* were held of the manor of *Eastball* in the ſame county, the trial ought to be by a jury of both vills; and here the *venire facias* was awarded *de vicineto Sporly* only, and ſo it was adjudged *Richmond v. Webb (a)*.—Second exception. That he alledged that *George Lether* held the land, and afterwards avows as upon the ſtatute, which is not good; for when he meddles with the name of the parſon, ſo as he takes conſuſance of him, he ought to avow on him by the common law, and not upon the land by the ſtatute.—But for that **THE COURT** held it well enough (b); but as to the firſt, it was a miſ-trial; for the *venire* properly ought to be of the manor, and of the place where the land lieth: but they gave day over to adviſe.

(b) By 11. Geo. 2. c. 19. ſ. 22. thoſe who diſtrain for rent or ſervices may avow generally. See alſo 4. Ann. c. 16.

CASE 8.

Crickmere against Paterſon.

Trinity Term, 30. Eliz. Roll 568.

If a teſtator deviſe land *ad ſolvendum* or paying ſo much per annum, it is a condition.

Post, 205. 378.

1. R. Abr. 410.

1. Leon. 174.

Moor, 853.

2. Com. Dig. 439.

4. Bac. Abr. 323.

Cowper, 841.

TRESPASS. Upon ſpecial verdict the caſe was, *Dorling* ſeiſed of lands, and having iſſue two daughters, deviſed the land to the eldeſt and her heirs, that ſhe pay to her youngeſt ſiſter yearly thirty pounds. The queſtion was, If this was a condition?—And all **THE JUSTICES** held it was; for ſo is the intent of the deviſor, and otherwiſe the youngeſt ſiſter had no remedy for the rent.—**WRAY** and **GAWDY** held, that if the words were, “paying thirty pounds to her ſiſter,” this clearly is a condition, and ſo “*ex intentione*,” or “*ad affectum*,” and his intent appearing, the law ſhall ſo adjudge it; and that the youngeſt daughter might enter upon a moiety, for which the action was brought. And it was adjudged accordingly. *Vide Co. Litt. 236. b.*

CASE 9.

Ward against Blunt.

In trover if the defendant pleads property in himſelf, and that the plaintiff found and loſt them, whereby he ſeiſed them, it is tantamount to the general iſſue, and bad.

Post, 174. 434. 485.

10. Co. 88. b.

Latch, 185.

Salk. 654.

Strange, 651.

5. Bac. Abr. 202.

ACTION upon the caſe *sur trover*. And ſuppoſed that he was poſſeſſed of divers loads of corn and hay at *H.* in the county of *M.* and that they came to the hands of the defendant by trover, and he converted them to his own uſe. The defendant pleaded, that before the trover he was ſeiſed of certain land in *Burton* in the county of *Stafford* in fee, and the corn and hay was growing upon that land, and he cut them as his proper goods, and was of them poſſeſſed till he loſt them, and they came to the hands of the plaintiff by trover; and he loſt them again, and they came to the

Post, 174. 434. 485. Cro. Car. 157. Yelv. 174. 1. Hob. 305. Sav. 13. Cr. 10. Co. 88. b. Latch, 185. Salk. 654. Strange, 651. 5. Bac. Abr. 202.

hands

hands of the defendant; and he converted as it was lawful for him to do. And upon this the plaintiff demurred in law; for the plea amounts but to the general issue; and this cause was shewn for demurrer.—EGERTON moved, that the plea amounts to the general issue, for it is no more than that they were his proper goods, and then he ought to plead *non culp'*; and if it be a plea, he ought to traverse WITHOUT THAT they were the goods of the plaintiff; for the plaintiff declareth that they were his proper goods, and he ought to answer it. 25. *Edw.* 3. 9. 22. *Edw.* 3. 18. 30. *Aff.* 22. 11. *Hen.* 4. 78.—ATKINSON *contra*. Although this plea amounts but to a general issue, yet he should not have demurred, but ought to have moved the Court, (9. *Hen.* 6. 11. 19. *Hen.* 6. 21.) that he should plead another plea, or a *nihil dicere* be entered; for demurrer being joined upon it, this is confessed, and then it is to be adjudged for the defendant.

WARD
against
BLUNT.

BUT THE COURT held, that inasmuch as this is the special cause shewn upon the demurrer, it is good, and then shall be adjudged for the plaintiff: and afterwards the plaintiff had judgment.

Simms against Westcott.

CASE 10.

ASSUMPSIT. The plaintiff declares, that in consideration that he at the request of the defendant should marry *Elizabeth*, the daughter of the defendant, he assumed to pay him 13l. 6s. 8d. after marriage when required, and should have all the hemp growing upon such land, and would give him a bed, and divers other things there expressed; and alledges *in facto* that he had married the said *Elizabeth*, and the defendant had not paid the 13l. 6s. 8d. nor any of the other things. The defendant pleads a special plea, and traverseth he did not assume *modo & forma*. The jury found he assumed to pay 13l. 6s. 8d. but did not assume any of the other things.—And I moved that the verdict was found for the defendant; for when the plaintiff declares of an *assumpsit* to do divers things, and the jury find he assumed to do only one of them, the plaintiff hath failed in the *assumpsit*; for he ought to shew the truth of his case, and not to vary from it.—And so was the opinion of WRAY, SCHUTE, and CLENCH.—GAWDY *contra*; and cited 32. *Hen.* 8. Br. "*Verdict*" 90. But WRAY said that book was no law, and the contrary had been adjudged in this Court.—Afterwards, GAWDY being absent, it was adjudged for the defendant; but the Court allowed him no costs; for WRAY said that was in their discretion.

In an *assumpsit* upon several promises, if the jury find only one of them, the action cannot be maintained.

B. R. H. 54.
Cowper, 766.
Doug. 666.
1. T. Rep. 240.
Post. 292.

Ante, 79, 80.

Lembro & Hamper.

CASE 11.

THEY were indicted for perjury upon the 5. *Eliz.* c. 9.—TAN-FIELD took exception to the indictment, in that it was, *false & corruptive deposuere*, but not *voluntariè*; and although at the end of the indictment it is, *& sic voluntarium commiserè perjurium*, yet this doth not help it.—And for this cause they were discharged.—GAWDY said, although the verdict pass against that which the witness deposeth, so as no action lieth against him, yet he may be indicted for it.

Falsè et corruptive is not sufficient on the 5. *Eliz.* c. 9. without *voluntariè*.
Post. 201.

Cro. Jac. 508.
1. Hawk. P. C. c. 69. s. 17.
Law, 69.

1. Hawk. 320. 3. Bac. Abr. 100. 817. Strange, 699. Rex v. Cox, Cases in Crown

CASE 12.

Rither's Case.

Perjury in
chancery is not
within 5. Eliz.
Ante, 137.

3. Inst. 166.

Yelv. 120.

2. Leon. 201.

HE was indicted for perjury committed in his answer in the star-chamber, upon his examination to interrogatories there. And because these matters are not within the statute, for he was not examined as a witness between the parties, nor in *perpetuam rei memoriam*, he was discharged.

1. Hawk. P. C. c. 69. f. 20.

CASE 13.

Lane's Case.

In perjury it
must be al-
leged that the
question was
material.

Ante, 137. Rex v. Aylett, 1. Term Rep 69.

HE was indicted of perjury; for that upon an issue in such matter between parties he did falsely depose such a thing, &c. but sheweth not how the issue was, nor how the deposition trenched to the point of the issue: and he was discharged.

CASE 14.

Burton's Case.

Indictment for
barratry con-
form stat. is
good.

Cro. Car. 340.

2. Roll. Ab. 79.

Cro. Jac. 527.

HE was indicted as a common barretor *contra formam statuti*.—COKE took exception, that there is no statute that makes this an offence; but it was at common law; and the 34. Edw. 3. c. 1. doth not make this an offence, but appoints a punishment.—But it was held good, for so are many precedents.

2. Keb. 409. 2. Hale, 191. 1. Strange, 181.

CASE 15.

Sir Rowland Hayward's Case.

Indictment
must be to the
nuisance of all
the king's sub-
jects. 5. Com. Dig. 166.

HE was indicted for stopping of a highway, *ad nocumentum diver-
forum ligeorum domine regine*.—And because it was not "ALL
the queen's liege people," he was discharged.

1. Hawk. P. C. 361.

CASE 16.

The Lord Dacre's Case.

Addition not
necessary where
outlawry does
not lie.

8. Hen. 6.

pl. 9. b.

HE was indicted for encroaching upon the highway; and exception taken, because it was not expressed of what place he was.—*Sed non allocatur*, for process of outlawry lieth not against him, but distress: and so it was ruled in the *Lord Pagett's Case*.

1. Wilton, 244. 21. Hen. 6. pl. 24. 2. Hale, 178*.

CASE 17.

Bullen against Grant.

If a copyholder
surrenders to
the use of his
will, and devises
for life or in
tail, the rever-
sion will de-
scend to his heir,
who may enter
before admit-
tance.

Ante, 84. 90.

Post, 307. 372.

442. 484. 717.

Co. Lit. 60. b.

4. Co. 23. a.

Gillb. Ten. 192.

194. 1. Leon. 174.

TRESPASS. The case upon evidence was, *Hugh Bullen*, father of the plaintiff, being a copyholder in fee, surrenders the land to the use of his last will, and deviseth it to his wife for life, remainder to *G.* his son in tail, remainder to *T.* his son in tail. The lord admits *M.* and afterwards admits *G.* The wife dieth. *G.* dieth without issue. *T.* is admitted, and surrenders to the use of the defendant, and dieth without issue. The plaintiff before admittance, being heir at law to *H. B.* enters, and upon an *ouster* brings trespass.—First, It was held *PER CURIAM*, that the heir may enter without admittance: for *WRAY* said, when the surrender is to the use of his last will, this at first is the whole fee; but when he deviseth the land for life or in tail, and doth not meddle with the reversion, by this the reversion never passed out of him to the lord, but descends to his heir, and he shall have it without any admittance.—Secondly, It was held, that a surrender of tenants

2. Com. Dig. 493. 4. Bac. Abr. 299. 1. Willf. 26. 1. Term Rep. 600.

in tail is no discontinuance, except the custom be so: and although it was moved, that there can be no *estate tail* of a copyhold, except it be shewn that the lands had been given so, and always enjoyed; and that afterwards it had been enjoyed by them in the remainder and reversion, and that their alienations did not use to bind, &c. for otherwise it shall be intended a fee; yet THE COURT held the contrary, that it shall be intended an estate tail, except the contrary be shewn, and that it is an estate tail, and so always used.

BULLEN
against
GRANT.

A surrender of a copyhold by a tenant in tail, is not a discontinuance.

Hedd against Chalener.

CASE 18.

THE case was, A *feme* copyholder takes husband, who let the land for more years than the custom doth warrant. The question was, If this be a forfeiture to bind the wife, as a condition in law?—WRAY. If the husband denieth to pay the rent, or to do suit at court, these are present forfeitures, which shall bind the wife, for they are things that the lord must of necessity have; but a lease is no great prejudice to the lord, and it is good to advise of it.—But SHURLEY and TANFIELD said it hath been adjudged, that waste is a forfeiture which shall bind the wife (a).

If the husband of a *feme* copyholder makes a lease not warranted by the custom, he forfeits only during his own life.

Post, 505.

1. Roll. Ab. 509.

2. Roll. Rep.

Ld. Ray. 1000.

344. Palm. 383. 4. Co. 27. a. Cro. Car. 7. 1. Ba. Ab. 303. 489. 3. Bac. Ab. 307. Gilb. Ten. 171. 243.

(a) Vide 9. Geo. 1. c. 29.

Mustard against Hopper.

CASE 19.

ASSUMPSIT. The plaintiff declares, that in consideration the defendant should enjoy such goods, &c. he would pay the party 25l. The jury, upon *non assumpsit*, find, that he promised to pay, if he enjoyed such goods, &c.—And it was adjudged for the defendant, because the plaintiff declared of an absolute promise, and the jury find a conditional promise.

A declaration on a *positive promise* cannot be supported by evidence of a *conditional promise*. Ante, 79.

Dougl. 666. 1. Term Rep. 240.

Bradburne against Elizabeth Bradburne.

CASE 20.

ASSUMPSIT.—THE COURT held, where there are divers considerations alledged by the plaintiff, and some are frivolous and void; yet if any of them be good, the plaintiff shall recover. And it was so adjudged.

The plaintiff shall recover in *assumpsit* if any of the considerations on

which he counts are good. Sed vide post. 759. 848. Cro. Jac. 110. 127. Dougl. 377. 730.

Royle against Bagshaw.

CASE 21.

ASSUMPSIT. And declares, that in consideration that he at the request of the defendant would deliver as many quarters of malt to J. S. to his use, as he would receive and have before such a day, the defendant promised to pay *tales denariorum summas*, &c. before the first day of August; and alledges in fact, that he delivered so many quarters of malt, viz. each of such value, &c. And upon *non assumpsit*, for part and payment pleaded for the residue, it was found against the defendant.

A promise to pay *tantum quantum meruit* with an averment *quid meruit tantum* is sufficient without saying *to whom*.

LEWIS moved in arrest of judgment.—First, It is not alledged to whom the money should be paid. Sed *non allocatur*; for it shall be intended to the plaintiff.—Second, The promise is uncertain, for he doth not promise any sum, but *tales denariorum summas*, but saith not what, &c. Sed *non allocatur*; for WRAY said, when the

Assumpsit lies on two considerations, though one of them be void.

Cro. Car. 77.

Post. 848. 1. Roll. Ab. 30. Poph. 182. Noy, 83.

ROYLZ
against
BAGSHAW.

Cro. Car. 77.

Cro. Jac. 263.

370.

1. Roll. Ab. 24.

1. Sid. 446.

1. Mod. 43.

Hard. 3.

Yelv. 134.

1. Lev. 3. 38.

3. Bl. Com. 161. Ante, 112. 1. Salk. 47. 53.

plaintiff afterwards shews the value of every quarter, it shall be intended he shall pay according to that rate, and such general *assumpsit* is good.—Third, There are two issues; the one, *payment*; the other, *non assumpsit*; and the jury find for both, *quod assumpsit*; whereas they should find for one, he did not pay; and for the other, that he did assume.—But because upon the *darfe* of the *postea* it appeared that the jury found both issues against the defendant, and it is but the misprision of the clerk of assizes, the record was rebailed to him to amend it; which he did: and the plaintiff had judgment.

CASE 22.

Sir Anthony Sturleyn against Albany.

Hilary Term, 31. Eliz. Roll 668.

What is a sufficient consideration to support an *assumpsit* for a rent charge granted out of a manor.
Ante, 67.

1. Leon. 297.

Cro. Car. 70.

1. Bac. Ab. 170.

2. Com. Dig.

532.

ASSUMPSIT. The plaintiff declares, that the *Earl of Arundel* granted to him a rent of forty pounds out of the manor of *Whittington*, and after conveys the manor to the defendant and his heirs; and that he 24. *Mart. 22. Eliz.* promised to the plaintiff, that if he would shew him a deed by which it should appear that he was to pay the rent, that he would pay to him all the arrears of it, and all that should be arrear after; and alledges that he 27th *April, 27. Eliz.* shewed a deed to the defendant, by which it appeareth that he ought to have the rent; and for eighty pounds arrear for two years last past, he brought his action. The defendant pleads, that after the promise, *viz. 2d July, 22. Eliz.* the plaintiff entered into the manor, and let it to *J. S.* for years. The plaintiff replieth, that 1st *Decemb. 27. Eliz.* the defendant re-entered, and for the arrearages after he brought the action: and upon the re-entry the issue was joined; and found against the defendant.

GLANVILLE, serjeant, took divers exceptions to the declaration.—First, because by the entry into the manor, the promise which was before, and the action upon it, is suspended; and being once suspended, it is gone for ever.

Cro. Car. 373.

WRAY, C. J. The action is brought for the two last years, which were after the re-entry, for which he had no cause of action before; and therefore cannot be suspended *omnino*.

GAWDY. It is not material when the arrears were due; for the cause of action, "the promise," was then *in esse*, which is suspended if the cause be so; but here the *assumpsit* is collateral, and is not suspended by the entry into the manor; for it is not issuing out of the land: but if the plaintiff had released all actions before the deed was shewn, and then the deed is shewn; yet the plaintiff should be barred, for the promise was before the release.

Ca. Lit. 292. b.

Second exception. Because the deed was not shewn in convenient time; for it was five years after, and so divers arrearages due.—*Sed non allocatur*; for it is the better for the defendant, the longer the time is before the shewing of the deed: but if the promise had been, that upon shewing the deed, to pay all that should be due at *Michaelmas*, there the deed must be shewed before *Michaelmas*.

Third exception. The promise is, If he shew a deed by which it appeareth he ought to pay the rent, he will pay it; and the plaintiff sheweth that he did shew a deed, by which it appeareth he ought to have the rent, and so meets not with the consideration.

tion.—And of that opinion was GAWDY; but the other Justices *contra*: for it is in the declaration, which, by the statute, is not to be overthrown for default of form, and so is well enough.

SWIRLEY
against
ALEANY.

Dobbin's Case.

CASE 23.

Trinity Term, 31. Eliz. Roll 562.

ASSUMPSIT. The plaintiff counts, that whereas he claimed to have a title to certain land in *D.* the defendant, in consideration that the plaintiff assumed to assign his right, title, and interest to the defendant, he assumed to pay him forty pounds, &c. And after verdict it was alledged in arrest of judgment, that this was an unlawful consideration, and against the statute of 32. Hen. 8. c. 9. for it appeareth not that the plaintiff was in possession by the space of a year before, so that he could assign to the defendant, nor that the defendant was in possession, that he might release to him.—*Sed non allocatur*; for it stands indifferent whether he was in possession or not, and a declaration shall not be avoided but for great cause. And the plaintiff had judgment.

Assumpsit in consideration of assigning land, is good, though it does not appear that either plaintiff or defendant were in possession for a year before.

White's Case.

CASE 24.

PROHIBITION. The plaintiff suggests, that by the statute of 21. Hen. 8. c. 6. no mortuary shall be paid but in such places where it ought to be paid before the making of the statute; yet he was drawn into the spiritual court against the said statute. And prohibition was granted; and LOVE said, so it was adjudged in 16. Eliz.

Prohibition to a suit for the payment of a mortuary.
Lut. 1069.
Cro. Car. 238.
3. Mod. 268.
1. T. Rep. 552.

Smith against M. Collins and three others.

CASE 25.

EJECTIONE FIRMÆ. After issue joined, the record of the *nisi prius* was at the suit of *S.* against *M. Sharpe* and three others; and found for the plaintiff: and this matter was alledged in arrest of judgment, and that there was no trial between the plaintiff and defendant.—Adjudged, *quod plaintiff nihil capiat per billam.*

A variance of the defendant's name in the *nisi prius* is fatal.
1. T. Rep. 782.

Scarlet's Case.

CASE 26.

TRESPASS. Verdict for the plaintiff.—**BARTLETT** alledged in arrest of judgment, that the *venire facias* was, “*et habeas ibi hoc breve*,” and said not “*nomina juratorum*,” so that the sheriff had no warrant to impanel a jury. Also it was *libratas pro libras*.—*Sed non allocatur*; being within the statute of jeofails. And it was adjudged for the plaintiff.

Defects aided by the statute of jeofails.

Wiggely against Bradshaw.

CASE 27.

Hilary Term, 31. Eliz. Roll 406.

ERROR. Bradshaw had judgment to recover by confession in debt, but had no judgment to recover damages; and for this cause the judgment was reversed.

Judgment reversed.

Molton's Case.

CASE 28.

COKE demanded the opinion of THE COURT in this case. Fine —Molton, being tenant-in tail, had issue two sons, Richard and John, and dieth. Richard levieth two fines of the land, and dieth without issue. John brings two writs of error upon these fines. The defendant to the first fine pleads the second fine not reversed;

1. R. Ab. 783.
2. Leon. 211.
Moor, 366.
1. R. Rep. 306.
Bridg. 77.

MOLTON'S
CASE.

reversed; and to the second he pleads the first not reversed. The question was, What is to be done?—CURIA. You may reply, that the said fine pleaded in bar is also erroneous, and so aid yourself. 7. Hen. 4. pl. 39.

CASE 29.

Besome against Crooke.

Trinity Term, 31. Eliz. Roll 763.

If an inferior court disallow a writ of privilege, or do not enter a bond on oyer craved, it is error.

- 3. Co. 141.
- 2. Brownl. 101.
- Vaugh. 154.
- 2. Buril. 36.
- Stiles, 373.
- 3. Ch. Caf. 69.
- Salk. 544.
- 6. Mod. 305.
- 4. Bac. Ab. 224.

ERROR of a judgment given in *Southampton* in debt upon an obligation.—First error. For that at a court held 9th *Novemb.* the defendant brought his writ of privilege; and the mayor being absent, the bailiffs allowed it, and gave day till the next court, when the mayor being present did disallow it; and for default of answer, *nihil dicit* was entered.—COKE said it was a plain error; for after the writ delivered they could not proceed. 6. Hen. 7. pl. 6. And if it be said the bailiffs are not judges, then they cannot hold a court; and then the day given by them is null, and so is a continuance.—Second error. Oyer being demanded of the obligation and condition, this is rehearsed in *hæc verba*, but are not entered; so it appeareth not the plaintiff had title.—For these causes the judgment was reversed.

CASE 30.

Palmer against Thorpe.

A. lets a manor for 30 years; and the next day lets it to another for 40 years to commence at *Mich.* next after the date. This passes a reversionary interest. Post. 287.

- 3. Co. 74.
- 7. Co. 155.
- 3. Bac. Ab. 438.

and the cases there cited. Dougl. 53.

THE case was, A. let the manor of D. to B. for thirty years, and the next day lets it to another for forty years, to commence at *Michaelmas* next after the date; the tenant doth attorn. The question was, If it be a good grant of the reversion, being to commence at a day to come?—GAWDY. A reversion for years cannot commence at a day to come, for then the grantor shall have a lesser estate in himself.—WRAY, C. J. The reversion being for years is a chattel which may well expect; and if I have a rent in fee, I may grant it for years to commence at *Michaelmas*; for an estate doth not pass, but an interest.—COKE. It hath been adjudged, if a man grants his term from *Michaelmas*, it is good; for it is as a lease from *Michaelmas*,

CASE 31.

Cadee against Oliver.

Husband and wife make a lease by indenture for years, the land being bound in a statute; they afterwards levy a fine of the reversion.

- S. C. reported at large, 3. Leon. 253, 154.
- Cro. Car. 598.
- 2. Roll. Ab. 48.

EJECTIONE FIRMAE. It was found by special verdict, that Lord Montjoy being seised in right of his wife, was bound in a statute of two thousand pounds, 6. Eliz. to Sir Lionel Duckett, and after let the land to Hoskins for twenty-one years, and after let the land to J. Cadee for ninety-nine years, to commence immediately. In 12. Eliz. the land was extended upon the statute at fifty-three pounds *per annum*. Lord Montjoy and his wife grant the land to Perry in fee, and during the extent J. Cadee grants the term to his son. Lord Montjoy died, the son enters upon the conusee of the statute, &c.—Two questions arose. First, If the grant of the term by J. Cadee during the extent be good? Secondly, If the lessee may enter upon the conusee of the statute without a *fiere facias*? COOPER argued *pro plaintiff*; HARRIS *pro defendant*.—HARRIS said, it had been resolved by the opinion of the two Chief Justices, that the grant of the term was void, for the extent might continue longer time or shorter, and so might continue longer than the ninety-nine years.—*Et adjournatur* (a).

- (a) See 3. Bac. Abr. 308.

Hill,

Hill, Rainsford, and Tempest, against Mallet.

CASE 32.

Trinity Term, 31. Eliz. Roll 811.

ERROR of a judgment in the common pleas in trespass and battery.—Error, that the entry is, that the defendant appeared *per HIGGINS, attornatum suum*.—COKE. This is merely the default of the clerk, which is helped by the 32. Hen. 8. c. 30. and if it had been *per attornatum suum* it had been good.—But this was denied: and THE COURT held that it is no appearance, for want of the christian name of the attorney, for there may be divers attorneys named *Higgins*; and if one appeareth for another as attorney without warrant, an action upon the case lieth, which cannot be here. 1. Mar. Dyer, 93.—WRAY, C. J. said, if there were any warrant of attorney, and his name appeareth there, it may be amended; but as it is, the judgment is erroneous.—FERRERS moved, that there was a warrant of attorney in the common pleas, in which his name appeared; and prayed the Court to award A WRIT *ex officio* to certify it, as 9. Edw. 4. 3. 11. Hen. 4. 92.—WRAY, C. J. In the case *Lord Norris v. Braybrooke*, it was much debated; and there, after *in nullo est erratum* pleaded, it was granted; for this plea goeth to a thing contained in the body of the record; and the writ was granted.

An appearance entered in the *surname* only of the attorney, is not amendable after verdict; but on error brought, A WRIT may be awarded to search for the warrant, and if his name be right there, it may be amended.

Ante, 59. 75. 84. 145. Post. 177.

1. Roll. Ab. 289. Cro. Jac. 6. Ld. Ray. 28. Dougl. 114.

Lee against Curveton.

CASE 33.

Trinity Term, 31. Eliz. Roll 902.

ERROR in debt upon bond. The defendant pleaded *non est factum*; and it was found against him. The plaintiff did count *per factum suum obligatorium*, but saith not *curia hic prolatum*; and this was assigned for error.—COKE. This is but matter of form, which makes not an error after verdict; and the clerk of himself might have put it in, without any instruction of the party (a).—Second error. That the judgment should have been, *quod capiatur*, and the judgment is, that *de fine nihil, quia pardonatur*, whereas in truth the plea was pleaded after the general pardon.—COKE. Perhaps he was specially pardoned.—But it was held, that shall not be intended; and for this last error the judgment was reversed.

Omission of the *proferat in debet* on bond is not material. Post. 217.

10. Co. 94. Cro. Jac. 32. Carth. 138. Stra. 329. 8:6. 1272. Dougl. 4. A special pardon must be

pleaded. 1. Leon. 300. Lane, 71. 1. Wils. 214. 5. Com. Dig. 320. 2. Bac. Abr. 515. 2. Hawk. 3. 1. Cases in C. L. 102.

(a) See 16. & 17. Car. 2. c. 8. and 4. & 5. Ann. c. 16.

Billingham against Mynors.

CASE 34.

Trinity Term, 31. Eliz. Roll 95.

ACTION for words, viz. "Thou art a traitor," spoken at *Welsden in Suffex*. The defendant pleads, that he spake these words at *S. in Hampshire*, viz. "such things traitors do," *ABSQUE* hoc that he spoke the words at *W. in S.* and upon this it was demurred.—After being argued by LUCKNER, it was held clearly by THE COURT, that the justification was ill, and the traverse upon it, for the action is general and transitory; and the defendant doth not justify the words in the declaration. And the plaintiff had judgment.

In transitory actions the defendant cannot traverse the place laid in the declaration. Co. Lit. 282. b. Ante 99. 4. Bac. Ab. 517. 2. T. Rep. 29.

Honeywood against Husbands.

CASE 35.

ACTION upon the case, for disturbing him of his common appendant to his land. And declared that *A.* was seised of the of common, must shew the right and interest of the lessor, and that the lessee has a distinct title. Dougl. 667.

An action, by a lessee for years, for disturbance

HONEYWOOD
against
HUSBANDS.

Ante 18.

5. Com. Dig. 78.

Co. Lit. 45. a.

Post. 253. 701.

5. Com. Dig. 57.

Ante 112.

land for life, remainder to *B.* in tail, remainder to the right heirs of *B.* and that time out of mind, &c. they had common in this land, for themselves, farmers and tenants; and that the said *A.* and *B.* let the land to him for years, whereupon he put in his cattle, and was disturbed, &c. After judgment given against the defendant upon *nihil dicit*; and a writ awarded to enquire of damages, and returned; PEPPER moved divers exceptions to the declaration (the judgment being the same term).—First, Because he sheweth not how the particular estate begun. 20. *Edw. 4. the Case of a Corody*.—Secondly, The prescription cannot be by the particular tenant; and here he joins the particular tenant and the remainder.—Thirdly, He counts that the particular tenant and he in the remainder did demise; whereas it is but the confirmation of him in remainder.—Fourthly, He doth not aver the life of the tenants for life.—TOPHAM *contra*. And he moved, that inasmuch as the judgment was given before, and a writ of enquiry of damages, no exception can be taken to the declaration; upon which judgment was given.—But THE COURT held the contrary; for no absolute judgment was given: for upon the writ of enquiry of damages returned, a new judgment is to be given, which is the perfect judgment, before which any thing may be shewn to stay judgment, and against the declaration: and so it was ruled.—And as to the first exception, TOPHAM said, it was not material, for it is but a conveyance to the action; and he is a stranger to the estate. 1. *Hen. 5. pl. 4*.—Secondly, The prescription is good, for the particular estate and the remainder is but one estate.—Thirdly, It is the lease of both. 27. *Hen. 8. pl. 11*.—Fourthly, The life of the tenant for life needs not to be averred, for it is the lease of one that had the inheritance.—GAWDY held the count good.—WRAY, *Chief Justice*. The third and fourth exceptions are not material; but for the first, the count is not good, for the plaintiff must, sufficiently entitle and enable himself to the action, which he pretends to be because of his interest in the land; and then he must shew a sufficient right and interest in his lessors: and to the second, he ought to make a distinct title to the common, and not confound them as he hath.—*Et adjournatur*.

CASE 36.

Tytherley against Welsh.

Easter Term, 31. Eliz. Roll 310.

If a defendant die after judgment and before execution, it is error if the plaintiff's attorney sue a *scire facias* against his executor without a new warrant.

2. Inst. 471.

Carth. 112. 193.

4 Bac. Ab. 409.

Sec. 1. Comp.

Practice, 105. to 109.

ERROR. The case was, The defendant had recovered against the testator of the plaintiff in debt, and after judgment, and before execution, the testator dieth. The attorney of the plaintiff in the action of debt sueth *scire facias* against him that is now plaintiff, to have execution without any new warrant, and recovers: and this was assigned for error.—GODFREY moved it was not error, for the attorney was not discharged by the judgment, but may well sue execution within the year. 33. *Hen. 6. pl. 49*. 34. *Hen. 6. pl. 51*.—GAWDY, *Justice*. It is true that the attorney may pray execution, but this is a new action against the executor; and it is against another person than against whom his warrant was.—And after for this cause the judgment was reversed (a)

(a) By 8. & 9. Will. 3. c. 11. s. 6. if a defendant die after interlocutory and before final judgment, in any action originally maintainable against executors, &c. the plaintiff shall have a *scire facias* against his executors, &c.

Person against Hickled.

CASE 37.

Trinity Term, 31. Eliz. Roll 66.

ERROR of a judgment given in the common pleas, *Mich. 30. & 31. Eliz. Rot. 3021.* in an *assumpsit*; where the plaintiff counts, that in consideration he by his servant had delivered to the defendant two bills of debt of three hundred *French* crowns, amounting to eighty pounds, to be received at *Roan* in *Normandy* to his own use, he such a day, &c. assumed to pay him sixty-one pounds. Upon *non assumpsit*, it was found for the plaintiff; and he had judgment.—Error was assigned; for there is no consideration to charge him, for it appeareth not how he should recover them, if he be denied payment, nor that they were bills made to the plaintiff, nor what benefit he may have upon them.—And these matters were alledged in the common pleas in arrest of judgment, as it was alledged by *GODFREY*, and confessed by *FERMOR*, *serjeant*; and yet they gave judgment for the plaintiff, that it was a good consideration, and well alledged.—And so *THE COURT* held here. But *adjournatur*. *V. postea, Hill. 32. placito 8.*

An *assumpsit* will lie upon the sale and delivery of bills of debt; but it must be alledged for what and to whom the money is due on them.
See post. 170.

1. Salk. 25.
8 Mod. 267.
2. Stra. 1211.

Yates against Windham.

CASE 38.

Vide Ante, page 64. Case 10.

ERROR.—After the errors were examined the plaintiff discontinued his writ; and because there was a manifest error in part of the record which remained in the common pleas, he obtained a writ out of the chancery to *ANDERSON*, C. J. to remove the residue of the record; which writ is in the *Register* 216. And this part of the record being removed and sent into the queen's bench, he brings a new writ of error, *coram vobis residet*, and would assign error upon the new part of the record removed.—*COKE* moved, that this writ is not warranted by any course, for this is to alledge diminution after *in nullo est erratum* pleaded, and then should be infinite, which the law will not suffer; and this course is not a writ of error to proceed upon the first record, for then it should not vary from it, for all shall be entered upon the first roll, but here it shall be upon a several roll, which is not by any means warranted.—*TANFIELD*. We have sued a special writ to remove the residue of the record, and another writ to the Court to proceed upon the whole record which is now in court, which is a special writ upon our case; and all that is removed is but one record; and all being removed, we cannot have any other writ; and so is not infinite.—And at another day being moved again, *COKE* said, the writ which is now brought, is but a writ of diminution which ought to issue out of this court, for this is the writ of diminution in *Fitzherbert*, 25. and the plaintiff after a *scire facias ad audiendum errores*, shall not have a writ of diminution; for he is to see that the record be full before he sueth his *scire facias* upon it, and the defendant after *in nullo est erratum* pleaded, shall not alledge diminution, as the books are; and then it shall be a great mischief if the defendant shall have no means to alledge diminution, that yet the plaintiff by his own act shall have it

A writ of error *coram vobis* cannot be brought to alledge diminution after *in nullo est erratum* pleaded.
Post. 281.

Latch. 198.
Cro. Car. 575.
Carth. 369.
1. Vent. 107.

2. Bac. Abr. 218.
Ld. Raym. 151.
Salk. 337.
Stra. 690.

Ante 84.
Post. 281.

YATES
against
WINDHAM.

it by discontinuing his writ of error; and a writ of diminution ought to be awarded out of the court where the record is, and not out of chancery.—TANFIELD. A writ of diminution doth alledge a certain parcel of the record which is not certified; but here no part in certain is alledged, but generally *residuum recordi*; and therefore it is not a writ of diminution. But admitting it be not well removed, yet is it not material; for being here, it is to be examined by the Court; as if an indictment be erroneously removed, yet being in court, it shall be proceeded upon. 7. *Edw. 4. pl. 22.* 9. *Edw. 4. pl. 32.* The Court *ex officio* in some cases ought to award a writ of diminution, where the party is estopped.—And all THE JUSTICES held that this is but a writ of diminution, for it is the same writ that is in *Fitzherbert*, and diminution cannot now be alledged, as 22. *Edw. 4.* and other books are, and this being awarded out of chancery cannot be a warrant to this Court; and so this Court cannot proceed upon it, nor is it to regard it being brought hither without warrant, *viz.* by a writ which is void, and so cannot examine errors upon it: but when such writ is to be awarded, and there is error in it, and the record is by it removed, it is otherwise, as 9. *Hen. 6. pl. 4.* But because the party had not appeared, they commanded he should appear; and then plead or demur to it, and they would make a rule in it. *V. postea Trin. 34. B. R. placito 2.*

CASE 39.

Sweeper against Randal.

Trinity Term, 30. Eliz. Roll 770.

What words
will amount to
a surrender.
Post. 486.

Co. Lit. 55. 137.
2. Vent. 206.
3. Mod. 298.
Stra. 1201.
Ld. Ray. 1145.
3. T. Rep. 441.

TRESPASS for taking his corn. Upon not guilty pleaded, the jury found that *J. Gilbert* let the land to the plaintiff at will, and afterward he agreed with *J. Gilbert* *ad sursum reddendum* the land and his interest in it to him, and that he entered and let it to the defendant, who took the corn. The question was, If this was a surrender, *viz.* "I agree to surrender my land?" and whether it imports an act to be done *in futuro* or in the present time?—GAWDY. This can be no surrender, but a relinquishing of his estate, if these words be any thing; for tenant at will cannot surrender no more than he can grant; but he conceived it was an act to be done *in futuro*.—WRAY. If I agree to let my land, this is no lease; no more shall this be a relinquishing of his estate.—SCHUTE agreed with them.—CLENCH. It seemeth the intent of the party was to relinquish the estate at the time of the speaking, for otherwise the words were void, for he may leave it at any time.—GAWDY. If his intent was so, the jury should have found it expressly, but they had not done so.—And the plaintiff had judgment.

CASE 40.

Davies against Thomas.

Accord and
satisfaction.
1. Com. Dig. 97.

DEBT upon a bond. The condition was to secure him harmless against *J. S.* in an action for fifty-three pounds, for which he was bail for him. The defendant pleads he had paid to *J. S.* twenty pounds in satisfaction of the fifty-three pounds, and so he kept him harmless.—But for that the plaintiff might be damnified before the payment, to which he doth not answer, the plea was held ill; and the plaintiff had judgment, *Vide 38. Hen. 6. pl. 13.*
Babington

Babington against Babington.

CASE 41.

DEBT. The defendant pleads a foreign attachment in London, which was after appearance and pending the action.—And after advisement, it was ruled to be no good plea; but no cause was shewn, and the defendant had a day to plead peremptory, or a *nihil dicit* to be entered.—WRAY said, this will be a precedent for the time to come.

“Foreign at-
“attachment” af-
ter appearance is
no plea in debt.
Ante, 101.
Post. 593. 691.
713.

1. Roll. Abr. 552. 1. Bac. Abr. 691.

Landydale against Cheyney.

CASE 42.

Hilary Term, 31. Eliz. Roll 638.

COVENANT. The case was, Tenant for life made a lease for years. The lessee by indenture grants, bargains, and sells all his estate, to have and to hold in *tam amplis modo et formâ*, as he ought to hold it. Lessee for life dieth; he in the reversion enters; and the bargainee brought a writ of covenant against the bargainor.—GODFREY argued that the action did not lie, for here is no garranty in deed or in law, but only a grant or assignment of his interest, which doth not imply any warranty; and if there be any warranty, yet the action lieth not, for the covenant doth determine with the estate; and so is 32. Hen. 6. pl. 32. 9. Eliz. Dyer 257. So if tenant in tail makes a lease for years, and dieth without issue, the covenant doth determine with the estate.—And of that opinion was THE COURT; and WRAY said it was a strong case. And because none came of the plaintiff's part, it was adjudged for the defendant.

Tenant for life
makes a lease
for years. The
lessee bargains
and sells. The
bargainee can-
not bring co-
venant against
the bargainor on
the entry of the
reversioner.
Post. 615.

Moor, 74.
1. And. 12.
Bendl. 150.
Dyer, 257.
1. Leon. 179.
Lit. Rep. 334.
1. Wood Con. 452.

Etnam against Tottam.

CASE 43.

DEBT upon a single obligation of thirty pounds. The defendant pleaded payment of three pounds *pendente billâ*; and demands judgment of the bill.—But because he pleaded it without any *specialty*, the plaintiff had judgment.

Part payment to
a bond *pendente
billâ* without a
specialty is a bad
plea. Post. 455.

Co. 5. 43. 2. 2. Salk. 519.

Benington against Benington.

CASE 44.

TRESPASS for entering into his house and land. The defendant pleaded it was the freehold of Joan Benington, and he entered as her servant, and by her commandment; and the issue was, If it were her freehold or not? The jury found it was the freehold of the plaintiff for two parts, and the franktenement of the said Joan for the third part. The question was, If the plaintiff should have judgment upon this verdict?

Upon an issue,
Whether it was
the defendant's
freehold? if the
verdict find they
were tenants in
common, the
plaintiff shall be
non-suited.
Post. 170.

THE COURT held clearly, he could not; for although the issue is found against the defendant, viz. that all was not the freehold of J. B. yet it appearing a tenancy in common, so that the plaintiff cannot maintain this action, judgment shall be given against him.—And it was adjudged for the defendant.

5. Com. Dig.
167.
B. R. H. 54.
Doug. 666. 668.

Lord 1. Term Rep. 240.

CASE 45.

Lord Stafford against Thynne.

Quære, If a non-suit on one issue in a writ of error, is a non-suit of the whole?

Post. 170.

Barnes, 312.

ERROR upon a judgment in an assise; and assigned one error in *fait*, viz. that the land lay in *D.* in the county of *Monmouth*, and not in the county of *Salop*, where the assise was taken. Upon this issue was joined; and at the *nisi prius* the Lord Stafford was non-suited; and this was now returned.—**COVENTRY** prayed that they might have execution in the assise, and that judgment might be affirmed; for being non-suited for one error, this is a non-suit in the whole writ of error.—**WRAY**. If there be error in the record, we cannot affirm it; but it shall remain as it is, and we will advise.

CASE 46.

Procter against Tayler.

Outlawry reversed.

ERROR to reverse an outlawry which was sued against him for costs.—The first error. That ten shillings was awarded to the defendant upon non-suit *pro damnis suis*; whereas it should be *pro misis et custagiis suis*. And this was held to be error.—Second error. That the sheriff did not return the day when one of the counties was held, as he ought; for it ought to appear to the Court when every county was held, that it may appear there were so many days between every county court as is appointed by the statute (a).—And for these causes the judgment was reversed.

(a) 2. Edw. 6. c. 25.

CASE 47.

Shelbury against Bird.

Hilary Term, 31. Eliz. Roll 120.

A writ of *droit close* directed *ballivis villa*, &c. is good; but if against an infant, the admission of guardians must be *per Curiam*.

Post. 172.

3. Co. 53.

1. Sid. 173. 342.

2. Inst. 261.

3. Mod. 236.

Hob. 5.

Pigot, 63, 64.

2. Vern. 342.

Prcc. Ch. 376.

8. Mod. 25.

2. Peere Will.

119. 297. 3. Peere Will. 140. Stra. 114. 304. 445. 708. 1076.

ERROR upon a judgment given in *Colchester*.

FIRST ERROR. That the writ of *droit close* was directed "*ballivis villa de Colchester*," whereas it should be "*ballivis suis*;" for they are the queen's baylies; and it is not sensible that it should be directed *ballivis villa*.—**COKE**. All the forms of the writs are so, and it is therefore good.

SECOND ERROR. The action is brought against an infant, who appears by his guardian, and no warrant appeareth for it; for the entry in such case is, *quod talis admissus est per Curiam*. 3. Hen. 6. pl. 17. Fitz. N. Brevium, 27. i. 16. Hen. 7. pl. 5.—**COKE**. This is error in *fait*, and in the common pleas the entry is *per custodem admissum*, &c. and a special entry is kept of it in a roll, and so perhaps is kept in *Colchester*.

WRAY, Chief Justice. This is no error in *fait*, but in the record.

GAWDY, Justice. The guardian ought always to be admitted

PER CURIAM. 2. Mar. Dy. 104.

CASE 48.

Appleton against Burr.

Easter Term, 31. Eliz. Roll 248.

Error assigned on a judgment in an action for an escape.

Ante, 26. Post. 289. Cro. Jac. 242.

ERROR upon a judgment in an action upon the case in the common pleas. The plaintiff counts, that he had sued *T. B.* and had a process to arrest him directed to the defendant, being

sheriff of *Essex*; and thereupon he sent his warrant to the bailiffs of the franchise of *S.* to take him; who arrested him, and delivered him to his deputy; and he suffered him to go at large, and had not his body at the day of the return, *in amissionis debiti sui periculum*.—FOSTER assigned divers errors.—First, He doth not alledge he delivered to him within the county, and then the sheriff had not cause to detain him.—Second, He doth not alledge he let him at large without sureties, for he ought to take sureties of him if offered.—Third, He alledges he had not his body at the day, and perhaps he appeared of himself, and then the plaintiff hath no prejudice.—Fourth, For that he saith, *in amissionis debiti periculum*, which is not material, if he loseth it not indeed.—GODFREY argued *cont'*.—But THE COURT gave no opinion (a).

(a) It was moved again, and the judgment was affirmed. Post. 289.

Hawes against Coney.

Trinity Term, 28. Eliz. Roll 1010.

CASE 49.

TRESPASS for breaking his close in *Thurkell*. Upon not guilty pleaded, the jury found a special verdict.—*John Smith* had issue *Thomas Smith* and *Robert Smith*. *Thomas Smith* was seised of a house and seven acres of land in *Thurkell* for life, reversion in fee to *Robert* his brother. The said *Robert* was seised in possession of forty acres of land in possession, in *Norton* in the same county. *Robert* made his will, and devised all his free and copyhold land to his executors for performance of his will, and the will of *J. Smith* his father, in which were divers legacies given, “to have and to hold to them and every of them, and that they should take the profits of it for ten years to the use of his will, and that afterwards his executors or one of them should sell the land, and distribute the money in performance of the said will,” and dieth. *Thomas* the brother being tenant for life, dieth within half a year after him. The executors enter into the land in *Norton*, but not in *Thurkell*, and occupied them for ten years; and after enter into the land in *Thurkell*, and sell all the land in *Thurkell* and *Norton*; whereupon the heir of *Robert* the deviser enters into the land in *Thurkell*.—The question was, If his entry were lawful?

What words in a will shall amount to an authority.

S. C. 1. Leon.
180.
Skin. 631.
2. Vern. 461.
3. P. Wms.
56.
2. Burr. 912.
Cowp. 313. 801.
1. Bro. Cas. Ch.
135. 311.

COOPER argued for the defendant, that by the words and intention of the will, they had no authority to sell the land in reversion; for the words, that “they shall take the profits for ten years,” shew his intent only for the land in possession, of which profit may be taken.

COKE *contra*. The profits shall be intended such profits as he may take of a reversion, and is like the case 34. *Hen. 6. pl. 6.* A devise was of all his tenements in *manibus suis existentibus*; the reversion shall pass; and cited the case 39. *Edw. 3. pl. 27.* for the exposition of words in the king's grant.

GAWDY, *Justice*. The reversion is not devised, for no profit of it.—But all the other Justices *contra*; for the intent of the devise was to perform the two wills, and to pay debts, &c. and perhaps the land in possession was not sufficient.—WRAY, *Chief Justice*, said, the word “all” persuaded him much that his intent was so; and the words “to have and to hold,” and the words “to take the profits,”

HAWES
against
CONEY.

"profits," are of one sense, for he cannot hold but by taking the profits; and here are two wills to be performed, and therefore the devise shall be taken in the most liberal manner for the performance of them. But if it had been found that the land in possession was sufficient to perform them, this might peradventure have altered the case.

CASE 49.

Dove against Williot.

A lease for years by parole made by the remainder-man of a copyhold in fee commences immediately, if the tenant for life join with him and surrender the estate to his use.

Post. 547.

Co Lit. 338.

3. Bac. Abr.

439.

4. Bac. Abr.

329.

1. Term Rep.

600.

TRESPASS. Upon special verdict the case was this: Tenant for life, the remainder in fee of a copyhold; he in the remainder maketh a lease by parole; tenant for life and he in the remainder join in a surrender to the use of him in the remainder in fee; the question was, If this were a good lease, and should take effect in the life of the tenant for life?—And it was held by GAWDY, CLENCH, and WRAY, that it should, for the lease is good against him in the remainder; and by the surrender of the tenant for life to the use of him in the remainder, his estate is drowned in the fee, and as it were extinct, and cannot hinder the lease to have operation; and is all one as if he were dead, and being all in one hand, cannot have any privilege severed from the inheritance; as if he in the remainder grants a rent-charge, and after the tenant for life doth surrender, the rent shall commence *presently*.—But GAWDY said, if a lease be made for two years, and after the lessor let the land by parole to another for four years; this is but a lease for two years, although the first lessee surrenders, for he had no power to contract for the first two years at the beginning; but otherwise it is when the estate is determinable upon an uncertainty. *Smith v. Stapleton, Plowd. 426.*

CASE 50.

Knowles against Palmer.

A return to an *elegit*, that the sheriff hath divided the land, but could not deliver it by reason of an extent, is no bar to a new execution.

Post. 310.

1. Roll. Abr.

905.

Cro. Jac. 338.

Gilb. Ex. 52.

See 3. Bl. Com.

419. directly

contrary.

Hob. 58.

Ld. Raym. 718.

Dough. 473.

THE case was moved by ATKINSON, That in debt after judgment, the party prayed an execution by *elegit*; which being granted, the sheriff doth return, that he had divided the land by oath, &c. but he could not make execution, for the land was extended upon a former statute; and thereupon the plaintiff prays a *capias ad satisfaciendum*, and had it. And thereupon ATKINSON prayed a *superfedeas*, because a *capias* is not to be awarded after an *elegit*, especially if the sheriff return he hath lands: but if the return were *nihil*, it were more doubtful; for when the plaintiff hath elected the highest execution, and the defendant hath land which may be delivered, he cannot resort to a lower execution.—GAWDY, Justice. He may have execution by *capias*, for this is the highest execution which can be, for it concerneth the body; and the difference is, that after a *capias* he cannot have an *elegit*, nor other execution; but after an *elegit*, if he be not satisfied, he may have a *capias*; and so is the better opinion of the books. 17. Edw. 4. pl. 4. 21. Hen. 7. pl. 19. 31. Ed. "Process" 52. 5. Edw. 4. Br. "Execution" 93. and the statute which giveth the *elegit* doth not restrain the execution at the common law. The other Justices seemed to agree with him; but they would advise.—Afterwards Knowles being taken by *capias*, he prayed remedy upon it.—But all THE JUSTICES held it well awarded; and they could not help him, although his case in equity, as it was opened, deserved favour.

Weeks against Holmes et Uxorem.

CASE 51.

DEBT against them for certain barrels of beer sold to the *feme*, *dum sola fuit*. They both waged their law; and this term both baron and *feme* did swear, according to the form of the oath.

QUOD NOTA: The baron did swear for the debt of the *feme*.

Wager of law.
Baron swears for
the debt of the
feme.

Co. Lit. 172. b.
and 295.

CASE 52.

Parkins against Hinde.

Trinity Term, 30. Eliz. Roll 418.

PROHIBITION for suing for tithes of land in Babington. The case was, The parson of Babington 29. Hen. 8. did lease all his glebe land to Mills for ninety-nine years, rendering thirteen shillings and fourpence rent for all exactions and demands; and now his successor sued for tithes of the land, being the glebe land: and upon it the plaintiff sued a prohibition.

Glebe lands shall
pay tithes in th
hands of the
parson's lessee,
although the
lease expresses
that the rent re-
served is for "all
"exactions and
"demands."

Post. 479. 578.

2. Roll. Abr.

57.

Owen, 39.

Moor, 47.

11. Co. 13.

Dyer, 43. in marg.

1. Leon. 300.

Owen, 39.

3. Burr. 1378.

GODFREY moved, that the prohibition lieth, because the land was let rendering rent, and it is for all exactions and demands; and by that he bars himself and successors of all tithes.

But all **THE JUSTICES contra**. For **WRAY** said, the parson shall have tithes against his lessee, and the words here shall be no discharge; for these tithes arise and accrue after, and are not things issuing out of the land, but collateral, and due *jure divino*; and therefore cannot be discharged but by special words. But if the words had been, as well for tithes growing and arising upon the lands as for other demands, then peradventure it had been a good discharge. But as the case is, it cannot be intended by any words, that he reserved the rent for tithes. And so **GAWDY, Justice**, did conceive, especially as the case here is, the lease being of twenty-four acres of land, and only thirteen shillings and fourpence reserved.—And afterwards, the same day, they granted a consultation: but they said, that the words shall discharge the lessee of all rents and services; but not of suit at court, or such things as are not then in demand. 11. Co. 13.

Mannings against Townsend.

Trinity Term, 31. Eliz. Roll 136.

CASE 53.

DEBT upon an obligation, dated 1st May, 27. Eliz. The defendant pleaded, that he was bound in this obligation *simul cum Rich. Gotts*, to whom the plaintiff had released all actions and demands the said first of May. The plaintiff by replication shewed, that after the obligation sealed by Gotts, he released to him; and afterward, viz. the same day, the defendant sealed the bond, and after that, *ABSQUE HOC quid tenetur simul cum Gotts*; and upon this it was demurred in law.—And it was clearly held, that this release doth not discharge the defendant; but they held the traverse to be ill because Gotts was bound with the defendant. But because the defendant had not taken advantage of it, to shew it upon the demurrer, and had confessed the matter *in fact* alleged by the plaintiff, it was adjudged, that the plaintiff shall recover, if nothing be shewn to the contrary within two days.

A release to one
of two obligors
shall not dis-
charge the other,
if he sealed the
bond after the
release was
given.

2. Roll. Abr.

412.

Cro. Jac. 372.

Co. Lit. 232.

Hob. 66.

Noy, 62.

5. Co. 97.

CASE 54.

Bugberd against Dominam Reginam.

Hilary Term, 31. Eliz. Roll 4, or 48.

The king shall not recover damages in a *quare impedit*; for he is not within the statute of Westminster.

2. Inst. 362.

6. Co. 51.

3. Leon. 150.

ERROR of a judgment in a *quare impedit* for the queen, for the church of *Rettington* in *Essex*:—Error assigned, that the judgment is, That the queen shall present, and recover for the value of the church for half a year.

FENNER, serjeant. The queen is not by the common law to recover damages, nor any other person, and the statute of *West. 2. c. 5.* giveth no damages but where the party is hindered of presentment; which the queen is not in this case, when she presenteth by her prerogative; as in this case, where she presenteth by reason of *lapse*. 14. *Edw. 3.* "*Quare Impedit*" 54. 3. *Hen. 6.* "*Damages*" 17. And he hath searched divers precedents, *viz. Pasch. 7. Hen. 5. Roll 442. & 2. Hen. 6. Roll 404. 9. Hen. 6. Roll 316.* where no damages are given; and the case of 7. *Eliz. Dyer*, 236. is but a *Curia advisare vult*. The statute cannot be intended to give damages but only to the true patron, and not to the queen, who claims only by prerogative.

GAWDY, Justice. The queen shall not recover double damages, for the queen cannot lose her presentment; but single damages is only for the *tort* in the presentment; and this the queen shall have, as any other person. The case of 13. *Edw. 3.* "*Quare Impedit*" 181. was near the time of the making the statute; and they best intended the meaning of the parliament; and although precedents now are otherwise, it may be that the king did not regard damages, or were never demanded.

WRAY, Chief Justice, contra. It is hard, that when one part of the statute will not serve for the queen, and she is out of it, that it shall be construed she shall have benefit of another part of the statute; and although the case of 13. *Edw. 1.* is so, yet divers books since that, in the time of *Edw. 3.* and *Hen. 6.* and since, are, that the king shall not have damages; and the books and precedents being so till 7. *Eliz.* it is fit to adjudge the case according to them.—**CLENOTH** agreed.

(a) Post. 180.

Afterwards (a), *Trin. 32. Eliz.* WRAY said, he had conferred with **ANDERSON**, **MANWOOD**, **PERIAM**, and **WALMSLEY** and all (except **PERIAM**) agreed, that no damages were to be given: and for that cause the judgment was reverted.

Michaelmas

31. and 32. Eliz. In the Common Pleas.

Sir Edmund Anderson, *Knt. Chief Justice.*

Sir William Periam, *Knt.*

Hugh Wyndham, *Esq.*

Thomas Walmsley, *Esq.*

Justices.

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

Annesly against Johnson.

CASE 1.

REPLEVIN. After a second deliverance, a return was awarded *Johnson*, and *averia elongata* being returned, a *withernam* was awarded of the cattle of the plaintiff, and afterwards the plaintiff cometh and satisfieth the defendant his damages; and prayeth a writ of restitution of his cattle.—**FLEETWOOD.** Cattle taken in *withernam* are not replevifable; for how then shall the party be satisfied for the meat of the cattle?—**CURIA.** They are not replevifable without doubt; but upon satisfaction he shall have a writ of restitution of the cattle, and so is the course; which all the clerks did agree. And as to the food, he hath the occupation of the cattle, and it is reason he should find them meat for it.—And the writ was granted. *Vide 16. Hen. 6. Return de Avers, 2.*

Cattle taken in *withernam* are not replevifable; but on satisfaction made, the owner shall have a writ of restitution without paying for their keep.

Owen, 46.

3. Leon. 235.

4. Bac. Abr.

379.

Ld. Raym. 719. 1. Salk. 248.

CASE 2.

Gostwick's Case.

A LEASE was made for two years, upon condition, that they nor either of them shall alien any part of the land without assent of the lessor. They make partition, and one alieneth his part. This is a forfeiture of the whole.

Forfeiture by alienation.

Ante, 35.

1. Wood. Con. 10.

Cowp. 263.

Dougl. 57. 184. 2. Term Rep. 425.

Anonymous.

CASE 3.

THE lord releaseth and grants his seigniory to the husband, who is seised of the tenancy in right of his wife, to him and his heirs. The husband dieth, and his heir distrains for the rent upon the lands.—**ANDERSON** and **THE COURT** held, that it shall inure as a *grant*, which is most beneficial to the grantee; and it is agreeing with the intent of the deed, that the husband and his heirs shall have it.

Deeds shall be construed so as to effectuate the intention for which they were made.

Co. Lit. 239. a.

Cowp. 600.

Anonymous.

CASE 4.

QUARE IMPEDIT. The queen having the advowson of the vicarage of *D.* grants the vicarage to *J. S.* The question was, If the advowson passeth?—**FENNER** argued it should pass. **PUCKERING contra.**—And all **THE JUSTICES** held it shall not pass. For by the queen's grant nothing shall pass, but what she intends to pass; and the vicarage is another thing than the advowson, and every thing must pass by its proper name; and it shall not pass in the case of a common person.

The advowson shall not pass by a grant of the vicarage.

Hob. 303. 243.

2. Will. 136.

Cowp. 9.

M 2

Anonymous.

CASE 5.

Anonymous.

Administration may be revoked. Post. 460.

NOTA. By ANDERSON and WALMSLEY: Administration committed may be revoked, notwithstanding the statute of 21. Hen. 8. c. 5. And so it has been often used. WYNDHAM and PERIAM doubted.

1. Lev. 155. 186. 1. Sid. 280. Allen, 36. 2. Brownl. 119. Fitz. 303. Style, 10. Latch. 68. Skin. 155. 3. Mod. 23. 90.

CASE 6.

Rookwood's Case.

Assumpsit will lie on a promise to pay an annuity in consideration that lands are not charged with it.

ROOKWOOD having issue three sons, had an intent to charge his land with four pounds *per annum* to each of his two youngest sons for their lives; but the eldest son desired him not to charge the land, and promised to pay to them duly the four pounds *per annum*; to which the two younger sons, being present, agreed; and he promised to them to pay it. And for non-payment after the death of the father, they brought an *assumpsit*.—The WHOLE COURT held clearly, that it was well brought, and that it was a good consideration; for otherwise his land had been charged with the rents.

CASE 7.

Hambledon against Hambledon.

A devise to three, and that each shall be the other's heir, is a joint-tenancy.

S. C. 3. Leon. 262. Savil. 92. Owen, 25. 1. Leon. 166. 3. Com. Dig. 33. Powd on Dev. 420. 422.

A DEVISE was to three, and that the survivor shall be each other's heir.—It was adjudged, that they were all joint-tenants. And so is the meaning of the will.

CASE 8.

Crisp's Case.

Trinity Term, 31. Eliz. Roll 1636.

The next avoidance of a church must be granted by deed.

Plowd. 150.

1. Leon. 207.

Co. Lit. 332.

10. Co. 63.

QUARE IMPEDIT. And declares of a grant of the next avoidance. The defendant demands over of the deed, and the plaintiff shewed a letter written to his father by the patron, in which he writ he had given him the next avoidance; and upon this it was demurred.—It was ruled clearly without argument against the plaintiff; for it was a mere mockery, and the grant cannot be without deed.

CASE 9.

Gillam's Case.

Bona sua in an action by an executor, mean the goods of the testator.

Ante 6. 1. Brown's Caf. Ch. 127.

EJECTIONE FIRMÆ. As executor for ejecting him out of his *ferme*, et *bona sua ibidem cepit*, &c. And after verdict found for the plaintiff it was alledged, that *bona sua*, &c. shall be intended his own goods, and not the testator's.—CURIA contra.

CASE 10.

Pemberton against Cony.

Debt lies against an executor *durante minore ætate*.

Ante, 43.

1. Wood's Con. 128.

J. S. makes an infant of the age of four years his executor, and doth by his will appoint that J. D. during the nonage of the infant shall have the disposition of his goods.—Debt shall be brought against J. D. during the infancy; for he is executor during that time.

George

George Ognell against Paston.

CASE 1.

31. & 32. Eliz. In the Exchequer.

DEBT. The case was, *Francis Woodhouse* was bound in a recognisance in chancery to *Ognell*, which being forfeited, *Ognell* sueth two *scire facias* against him, and both were returned *nihil*, and thereupon had judgment to recover his debt; and thereupon he sueth out a *levari facias*, which was returned *nihil*; and thereupon he sueth a *cap. ad satisfaciendum* directed to the defendant, sheriff of *Norfolk*; the said *Woodhouse* being then in prison for suspicion of felony, and the defendant doth arrest him upon it.

Woodhouse was arraigned and found guilty; and afterwards being discharged of the felony. The defendant suffers him to go at large. *Ognell* brought debt upon the escape. The defendant pleads the conviction of felony. Upon this the plaintiff demurs.

First question. If a *capias ad satisfaciendum* lieth upon a recognisance in chancery, a *scire facias* being returned upon it?

Second question. Admitting a *capias* was not grantable, if it be void, or only erroneous, so as the party must avoid it by *audita querela*, or error?

Third question. *Woodhouse* being in prison for felony, if the execution was well served upon him?

This term it was argued by the BARONS; and as to the third point, they all resolved, and the counsel of the other party did not much inforce the contrary, that execution was well served upon him; for although his body was at the queen's pleasure, yet he shall not take advantage of his own tort (no more shall the sheriff), but he shall answer the action or execution of a common person.

And as to the first point, all THE BARONS were of opinion, that the process was well awarded, and maintainable by the law; for it being a debt of record, it is not reason but his body should be liable to execution upon it, as to a common obligation; and this *capias* is not by the statute of *West. 2. cap. 45. or 25.*

Edw. 3. but by the course of the common law, and the course of the chancery, and precedents are usual there after *scire facias*; and their courses are to be maintained as of other courts.

Second question. Admitting the *capias* lay not, yet it is not void, but erroneous. And this the sheriff shall not dispute, nor take advantage of it; for it was a good warrant to the sheriff to take him, and false imprisonment lieth not against him. *9. Edw. 4. pl. 13. 21. Edw. 4. pl. 23. 36. Hen. 6. pl. 32.* And it shall always be a good execution, until the party avoid it by error.—And by all their assent the plaintiff had judgment.

Ca. fa. lies after scire facias returned upon a recognisance, and may be executed upon a prisoner committed for felony; and after judgment in debt against the sheriff for his escape, the sheriff cannot dispute the validity of the writ, for tho' it were erroneous, it is not void.
Post. 138. 214.
271. 516. 576.
707. 776. 893.

Godb. 403.
2. Leon. 84.
Moor, 274.
8. Co. 142. a.
1. Roll. Abr. 897.
Yelv. 42.
Cro. Jac. 3.
3. Mod. 324.
Carth. 148.
5. Mod. 413.
Ld. Raym. 776.
4. Burr. 2034.

Hilary Term,

32, Eliz. In the Queen's Bench,

Sir Christopher Wray, *Knt. Chief Justice.*Sir Francis Gawdy, *Knt.*John Clench, *Esq.*} *Justices.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Venard against Wotton.

Words imput-
ing forgery,
must import that
it was of a pu-
nishable kind, if
true, or they are
not actionable.

1. Yelv. 146.

3. Bulst. 265.

1. Hawk. P. C.

338.

In 2. Str. 749.

this case is de-

nied to be law.—2.

Ld. Raym. 1463.

ACTION for these words: "You have falsely forged your father's hand, and thereby falsely have procured your father's tenants to pay their rents to you, due to your sister." After verdict for the plaintiff, FULLER moved, that the words are not actionable, for it is not shewn what thing he forged, for which he is by any law punishable. And here it may be he counterfeited his father's hand to a letter, for which he is not punishable. 28. Eliz. inter Brook et Doughty, "You have forged my Lord of Leicester's hand to such a letter," adjudged not actionable.—And so was the opinion of THE COURT: and judgment for the defendant.

CASE 2.

Taylor against Vale.

Michaelmas Term, 31. & 32. Eliz. Roll 68.

If a man by in-
denture "give
"and grant" a
rent-charge, and
the deed is en-
rolled pursuant
to 27. Hen. 8.
c. 16. it is a
"bargain and
"sale," but it
must be so
pleaded.

8. Co. 93. b.

Co. Lit. 309.

672.

1. J. 30.

2. Inst. 6-2.

3. Leon. 16.

Tough, 219.

REPLEVIN. The case was upon demurrer. Vale having a rent charge in fee by indenture, which was enrolled within six months, giveth and granteth it to Hall in fee, and there was no attornment.

NOTA. In truth the case was, that he for a certain sum of money giveth, granteth, and selleth the rent, &c. But it was pleaded only, that he by indenture *dedit et concessit*.

And it was ruled without any argument, that the rent without attornment (a) passeth not, being only by way of grant, and not of bargain or sale; although the deed was enrolled.—But WRAY said, that if by indenture, in consideration of a certain sum of money, *dedit et concessit* and the deed is enrolled, this shall pass the rent without attornment, though there be no words of bargain and sale.—And the plaintiff had judgment.

7. Co. 40. 1. Leon. 25. Yelv. 213. 3. Lev. 16. 1. Wood's Con. 239. 652. Sheph. Gilb. Uses, 88. 287.

(a) See 4. & 5. Ann. c. 16. by which the necessity of attornment is taken away. Vide Douglass, 283. 1. Term Rep. 384.

Willis

Willis against Jermin.

CASE 3.

Hilary Term, 31. Eliz. Roll 674.

EJECTIONE FIRMÆ. It was found by verdict, that the dean and chapter of *Exeter* let the land to *Harvy* for years, rendering rent, payable at their chapter-house in *Exon*, and for default of payment the lease to be void. *Harvy* assigned his estate to the defendant; the rent was arrear, and not paid, being demanded at their chapter-house. The dean and chapter, by the name of the dean and chapter of *St. Mary DE Exon* (whereas they were incorporated by the name of *St. Mary IN Exon*) make an indenture of lease for twenty-one years to the plaintiff of the land, and in their chapter-house put their seal to it, and make a letter of attorney to *J. S.* to enter and make delivery of this deed upon the land, which he did accordingly; and, If this be a good lease? they pray the opinion of THE COURT.—*HARRIS, serjeant*, prayed judgment for the defendant.—**FIRST**, The lease of the land is void by *misnemer* of the corporation. *Sed non allocatur*; for it is no material variance; and so it hath been ruled.—**SECOND CAUSE**. The lease was not good, because the dean and chapter let it in their chapter-house, by setting their seal to it; which being a perfecting the deed of the corporation, there can be no other delivery. Then the first lessee continuing in possession, and they out of possession, the lease was void; and the delivery after by the attorney, it having a former delivery, is void. *Sed non allocatur*, for there is no other means for a corporation to make a lease but this. And *GAWDY* said, it is plain that it is not the lease or deed of the corporation until delivery, as of another person.—**THIRDLY**, The first lease ceaseth not till entry, and so cannot make a new lease.—*WRAY*. The first lease doth clearly cease without entry, *GAWDY* doubted.—**FOURTHLY**, The lease is not good, for the attorney hath not executed his warrant according to his authority; for it was, that he should enter and claim it to the use of the corporation, and then deliver the lease. And the jury found that he delivered it upon the land, but found not that he entered and claimed, &c. *Sed non allocatur*; for in a special verdict, the circumstances of every thing need not so strictly be found, as it is to be pleaded; and it being found, that by virtue of the warrant he delivered it upon the land, it shall be intended he pursued it duly,

If a dean and chapter seal a lease, it is their deed immediately; but if at the same time they make a letter of attorney to deliver it, this is not their deed till the delivery. Post. 221.

1. Roll. Ab. 830.
2. Roll. Ab. 23. 42. 428.
- Co. Lit. 36.
3. Co. 64.
11. Co. 20.
1. Wood Con. 232.
3. Bag. Abr. 396.

If a verdict find that a man virtute warrantii made a lease, it shall be intended that he pursued his authority. Post. 181. 128. 669.

- Co. Lit. 48.
9. Co. 51.
5. Com. Dig. 170.
- Demand of rent where it is payable is sufficient. Co. Lit. 202. 2. Post. 415.

—**FIFTHLY**, It is found that they demanded the rent at the chapter-house, whereas the demand should be upon the land. *Sed non allocatur*, for the demand at the place where it is payable is sufficient.—And the plaintiff had judgment.

Smith against Hillier and Clerke,

CASE 4.

Trinity Term, 31. Eliz. Roll 808.

FALSE IMPRISONMENT in *Middlesex*. The defendant pleads that *Lynn* is an ancient village, and that in it *usitatum est a tempore quo, &c.* to chuse a mayor every year, and that the mayor for all the time, &c. was *custos gaolæ* there; and sheweth, that a plaint was entered in the court there against the plaintiff, for which he was committed by the mayor to the gaol there, *ABSQUE* hoc that they are guilty of the imprisonment in *Middlesex*: upon which the plaintiff demurs.

SMITH
against
HILLIER
and
CLERKE.

TANFIELD for the plaintiff. The bar is not good. First, Because the prescription is, that for all the time, &c. the mayors had been keepers of the gaol, which was no good pleading of the custom; for he ought to say, *usitatum est*, &c.—Secondly, The mayor cannot commit one to himself; for there ought to be one to commit, and another to receive; and not to be both one person.—Thirdly, he doth not prescribe to have a gaol there, nor sheweth not there was a gaol there; and it may be, that he may make his gaol where he pleaseth, and then the plea should be, *commissus custodia majoris*, and not to the gaol; or the prescription should be, that the mayor, &c. was *custos* of all prisoners, and not *custos gaole*.—Fourthly, He traverseth ABSQUE HOC that he was guilty in *Middlesex*, which is not good; for he cannot traverse the place, but generally, for the defendant cannot straiten the plaintiff to a place.—Fifthly, The defendant justifying between the 28th day of September and the 14th of October, at which day he was removed by *habeas corpus*; and shew, that the 29th day of September Hellier was chosen mayor, but do not answer to the time of the day of 29th September, before which he was chosen mayor; for it may be, he imprisoned him the same day, before he was chosen mayor, which is not answered.

COKE for the defendant. The bar is good, notwithstanding the exceptions.—First, It is once alledged, that *usitatum est* to chuse a mayor, &c. then *usitatum est* shall be referred to every part of the prescription, and need not reiterate it to every part.—Secondly, The course of all corporations is, that the mayor, which is the judge, is gaoler also: so the sheriffs of London, they have a court in the Guildhall, and are officers and gaolers, to it.—Thirdly, He need not prescribe in the gaol; for it is incident to a court to have a gaol, as a court of piepowders to a fair; also a gaol is not in a place certain, but goeth with the person of the gaoler.—To the fourth, The traverse is good; for if he traverse generally, the justification in a place certain shall be waived, which is material as this case is, and shall not be enforced to it, where it is local; and in *Cover's Case*, it was adjudged in false imprisonment, he justifies as constable in *Sussex*, ABSQUE HOC that he is guilty in *Middlesex*; and awarded good. So in *Lovel's Case* in trespass, for taking his horse in Cambridge, he justifies for damage-feasant in *Essex*, ABSQUE HOC that he was guilty in Cambridge; and it was good by award.—To the fifth, upon which it was much relied, he answered, that it shall be intended a justification for the whole day; for there shall be no division of a day. And if he imprisoned him before he was mayor, the plaintiff must shew it; for *prima facie*, it shall be intended to go to the whole day. 15. *Edw. 4. pl. 23. 9. Edw. 4.*

And of the same opinion was THE COURT in omnibus: and it was adjudged for the defendants.

CASE 5.

Kimersly against Cooper.
Trinity Term, 31. Eliz. Roll 768.

In words imputing perjury in an oath taken before magistrates, the plaintiff must shew they had authority to administer it; and though only inducement, yet being what intitles the plaintiff to his action, it may be traversed, if no law wager is allowed.—1. Roll. Abr. 563. 5. Com. Dig. 116. Dougl. 156. 1. Term Rep. 69.

ACTION FOR WORDS. The plaintiff declares, that whereas by the custom of London the mayor, recorder, and aldermen of London, being justices of the peace, had used to take the depositions and examinations of any person produced before them in *perpetuam rei memoriam*, and to keep the said depositions upon record

in the court of the *Guildhall*, to be given in evidence to a jury for the better knowledge of the truth between any persons; and that whereas he was examined and sworn before *Sir George Bond*, mayor of *London*, being then and there a justice of peace, as a witness on the behalf of *Ed. Sta.* and made such oath, &c. the defendant said that he had falsely sworn in the said oath, *innuendo* the oath there taken in form aforesaid, &c. to his damages, &c. The defendant pleaded, that the plaintiff was not sworn before the said *George Bond modo et forma, prout, &c.*

KIMBERLY
against
COOPER.

1. Hawk. 319.

Upon this it was demurred in law.—First, The traverse cannot be taken; for the alledging of the oath is but conveyance to the action, and so is not traversable; and if he never took such oath, yet it is a great slander.—Second, This plea amounts to a general issue, and so is not good.

HARRIS of *Lincoln's Inn contra.* That the declaration is not good; for the force of it is, that the mayor had used to take the oath, &c. And if he had not authority, it is no more than if the plaintiff had taken a voluntary oath; in which for saying he is forsworn, is not actionable. And the custom to warrant him to take the oath is not well alledged; for he ought to alledge, that the city is an ancient city; for otherwise he cannot prescribe in it (a). 21. *Edw. 4. (a) Strange,* pl. 54. 12. *Edw. 4. pl. 8.* 22. *Hen. 6. "Prescription" 47.* And the 1187.
traverse is good, for it is not the conveyance, but the principal 1. Will. 8.
substance of the action, and without it the action is not maintain- 3. Atk. 44.
able, and so is traversable. 34. *Hen. 6. pl. 22.* 13. *Edw. 4. pl. 4.*
26. *Hen. 8. Bro. "Action sur Case" 103.* 14. *Hen. 4. pl. 30.*

GAWDY. Where the conveyance to the action is that which doth entitle the plaintiff to the action, it may well be traversed, if the defendant cannot wage his law, otherwise where he may wage his law. 8. *Hen. 6. pl. 5.* 22. *Edw. 4. pl. 29.* 7. *Edw. 3. pl. 54.* 31. *Hen. 6. pl. 10.* 26. *Hen. 8. Bro. "Traverse." 5.* *Hen. 7. pl. 3.* But principally for the first fault, that he alledgeth not that it is an ancient city, the declaration is not good.—And of the same opinion were THE OTHER JUSTICES, that it is a thing traversable, for the action is grounded upon it: and it was then adjudged for the defendant, without further argument.

Post. 201.

Alexander against Dyer.

CASE 6.

Trinity Term, 31. Eliz. Roll 901.

DEBT for rent reserved upon a lease for years. And declares, that whereas he let the land to the defendant for twenty-one years from the feast of *St. Michael* next ensuing, rendering rent, and that the defendant had entered the 29th day of *September*, and had occupied for one year, &c. The defendant pleaded *nihil debet*; and after verdict against him, it was alledged in arrest of judgment, that it appeareth in the declaration, that he had entered upon *Michaelmas-day*, which is a day before his title began, and so is a disseisin, and no rent due.—GAWDY. It is clear he is a disseisor by his entry, and the accruing of his term shall not alter his estate. 7. *Edw. 6. Dyer, 89.* Yet debt lieth for *privity of contract.* 24. *Hen. 8. Dyer, Rushden's Case.*—And so was the opinion of THE OTHER JUSTICES; and the plaintiff had judgment.

Debt lies for rent upon a lease, tho' the defendant entered before his title began.

Post. 906.

1. Roll. Abr.

605.

2. Roll. Ab.

420.

2. Leon. 99.

3. Co. 23. b.

8. Mod. 54.

3. Bac. Abr. 104.

447.

Dod

1. Strange, 550.

CASE 7.

Dod against Coke.

In trespass, a verdict may be good, tho' it varies from the issue.

Ante, 143. 157.
Post. 799. 866.

2. Roll. Abr.

703.

Cro. Jac. 134.
662.

TRESPASS for breaking his close, called *Sheeps-course*, in *High-field*. Upon not guilty, the jury found, that the place containeth divers acres; the plaintiff is seised of one acre in it, in which the defendant had entered; and that the defendant is seised of a great part of the said place, and the *Earl of Sussex* of another great part of it.—Upon motion, **THE COURT** held the action well brought; for although the plaintiff counts of the breaking of his close, called *Sheeps-course*, in *High-field*, yet he may assign his trespass in which place he pleaseth: so the verdict is found for the plaintiff; and it was adjudged for him,

CASE 8.

Penfon against Hickbed,

Vide Ante, page 155.

Buying bills of debt is not maintenance.

THE case was now moved again, and two causes were assigned why the consideration was not good.—First, It is not alledged for what the money contained in the bills was due, nor to whom; and it may be they were bills made to the defendant himself, and due to him, and so no consideration.—Secondly, This buying of bills of debt is maintenance, and so no consideration.—For the first, **THE JUSTICES** held the consideration is not well alledged for the causes aforesaid. But for the second, they held it is not maintenance, for it is usual amongst merchants to make exchange of money for bills of debt, *et c. contra*. And **GAWDY** said, it is not maintenance to assign a debt with a letter of attorney to sue for it, except it be assigned to be recovered, and the party to have part of it.—And the judgment was reversed.

See 9. & 10. Will. 3. c. 17. and 3. & 4. Ann. c. 9.

CASE 9.

Lord Stafford against Thynne,

A *capias pro fine* lies against a peer for disseisin; and an assise

"*de tenemento*," without saying "*de libera*," is sufficient.

Ante, 158.

Post. 503.

1. Roll. Abr.

220.

6. Co. 54. a.

2. Infl. 236.

Hob. 61. 2. Hale, 199.

ERROR of a judgment in an assise.—First error, That the defendant counts of a *disseisin de tenemento*, but saith not *de libera tenemento*.—Yet it was held good, for so much is implied.

Second, The judgment is *ideo capiatur*, and *capias pro fine* lieth not against a baron of parliament. 11. Hen. 4. pl. 15. 27. Hen. 8. pl. 22. 29. Edw. 3. pl. 39. 14. Eliz. Dyer, 315. But it was held by **THE COURT** to be good; for it is upon a disseisin found, upon which a fine is given by the statute; in which no person being exempt, it shall bind a nobleman as any other; and where a fine is due, a *capias pro fine* (a) is to be awarded; and for a contempt a *capias* lieth against a nobleman, and this fine is for the contempt to the law; so is 1. Hen. 5.—And the judgment was affirmed.

(a) This writ is abolished by 4. & 5. Will. 3. c. 12.

CASE 10.

Lane against Milward,

Trinity Term, 31. Eliz. Roll 490.

Amendment.

Ante, 79.

Post. 543. 609.

Co. 8. 159. a.

ERROR upon a judgment in *Reading*, upon an *assumpsit*.—First error, That the *venire facias* was 24. *jurator* where it should be 12. *jurat*. And this at first was held error, but after divers ancient precedents

precedents were shewn, where such *venire facias* were awarded, it was allowed to be good; for they would not reverse so many precedents.—Second, The action was against *William Milward*, and the judgment was against *prædict. Thomas Milward*. But THE COURT held it was but a misprision of the clerk, and might be amended in affirmance of the judgment.—And the judgment was affirmed.

LANE
against
MILWARD.

Proud against Hawes.

CASE 11.

ACTION FOR WORDS: “That the plaintiff was a common barretor.”—After verdict, it was alledged in arrest of judgment by EGERTON, *Solicitor*, that the words were not actionable. And so it seemed to THE COURT: and the judgment was staid.

Words not
actionable.

Cro. Car. 192.
Hob. 140.
4. Bac. Abr. 472.

Ryle's Case.

CASE 12.

ACTION for these words: “He is a couzening knave; for he hath sold me a chain of copper for a chain of gold; and he is a couzening knave upon record.”—ATKINSON moved, that the words are actionable, and vouched *Bedford's Case*, for saying, “Thou art a couzening knave, for thou soldest a saphir for a diadem;” and the action was maintainable.—But WRAY and GAWDY conceived the words are not actionable, except it had been alledged, that he was a goldsmith, and got his living by selling of chains and such wares; then peradventure the action would lie, but not here.

Words not
actionable.

Ante, 95.

Johnson against Tucke.

CASE 13.

Michaelmas Term, 31. & 32. Eliz. Roll

ASSUMPSIT. Which was supposed to be in the parish of *St. Mary le Bow* in London. The defendant pleads to part *non assumpsit*, and to the other part a release in the parish of *St. Magnus, London*; and issues were joined upon both, and one *venire facias* awarded to try both issues: and this was *de vicenetode Bow*, and found for the plaintiff.—EGERTON, *Solicitor*, moved in arrest of judgment, that it was a mis-trial, for the *venire* ought to be of both places: for it was agreed, that the plaintiff might have, if he pleased, several *venires*; and might have at his election but one *venire facias*; and he relied upon 27. Hen. 6. pl. 6.—But it was moved, that it was a good trial for the issue which was at *Bow*, and a discontinuance for the other. 11. Hen. 7. pl. 5.—But the opinion of THE COURT was, that inasmuch as the *venire facias* was awarded for trial of both issues, this is a mis-trial in all, and cannot be good for one. But in 11. Hen. 7. pl. 5. the question did arise, for that it did not appear that the *venire facias* was awarded to try both the issues, and judgment was staid. And they said he might take a *venire facias de novo* if he would.

It will be a mis-trial if only one *venire* is awarded, where two issues are joined in different parishes.—See *vide post. note (a), page 260.*

Ante, 114.

Ward against Thorne.

CASE 14.

ACTION FOR WORDS. For calling him “rebellious and traitorous knave.”—After verdict for the plaintiff, it was moved in arrest of judgment, that the action did not lie; for rebellious

Words action-
able.

WARD
against
THORNE.

rebellious may be upon a proclamation of rebellion out of chancery, or other courts: and when traitorous and rebellious are coupled together, they are of the same sense.—CURIA. For the words “rebellious knave,” action lieth not; but “traitorous” being joined with it, action lieth.—The plaintiff had judgment.

CASE 15.

Tross against Michell.

The garnishee
may plead “nil
debet,” with-
out saying he has
“no goods;” and
judgment can-
not be for costs,
but it must dis-
charge the gar-
nisher.
Post. 184.

S.C. 1. Leon. 321.
22. Edw. 4. 30. b.
Jones, 406.
1. Com. Dig. 425.

ERROR of a judgment in *Exeter* against the plaintiff upon a foreign attachment; where a suit being by *Michell* against *Hore*, the said *Hore* was returned *nihil*. And it was furnished, that the said *Tross* had certain money in his hands due to *Hore*; whereupon, according to the custom there, this money was attached in the hands of *Tross*. *Tross* came and pleaded *nihil debet* to *Hore*. And upon this *Michell* doth demur; and adjudged for him, because he ought to have pleaded that he oweth nothing to *Hore*, nor had any money in his hands due to *Hore*. And upon this *Tross* brought a writ of error.—First error. Because it is a good plea, and the plaintiff was to be barred, and not to recover; and so is the common pleading in *London*: for if it be no debt, it is not attachable. But it was answered, that it is no plea; for he may have money in his hands which is attachable, and yet no debt; as if he hath money to keep, or if he find the money of *Hore*, or otherwise: and therefore he ought to answer to every intent, and not to one intent only. But *GAWDY* said, it is good to a common intent, and so is the custom of *London*.—Secondly, Because *Michell* had judgment to recover costs against *Tross*, which are not recoverable upon a foreign attachment.—Thirdly, Because no judgment was given, that *Tross* shall be discharged against *Hore*.—And the judgment was reversed, principally for the first error.

CASE 16.

Shelbery against Buffard.

Errors in a
judgment on a
writ of right.
Ante, 158.

A writ of right
cannot be main-
tained without
shewing an ac-
tual seisin by
taking the spleen.
Daly v. King,
C. B. East.
28. Geo. 3.

ERROR of a judgment upon a recovery against *Bird* in *Colchester*, in a writ of right, in which the plaintiff was vouched, and came in and voucheth the common vouchee, and loseth by default.—FIRST, The writ of right was directed “*balli- vis villæ suæ de Col.*” whereas it should be “*ballivis suis, &c.*” for they are the queen’s bailiffs.—SECONDLY, The declaration was made before the appearance of the defendant by attorney, or in person.—THIRDLY, *Shelbery* the vouchee appearing by guardian, the entry was, “he appeared by guardian,” but saith not, “*ad hoc per Curiam admissum.*”—FOURTHLY, The judgment was general against the vouchee, and not for the land only within the jurisdiction.—FIFTHLY, The demand is, “*de medietate duor’ mesuagior’*,” and the judgment is, “*quod recuperet tenement. prædict.*” whereas it should be, “*medietatem tenement. prædict.*”—SIXTHLY, Because no judgment was given for *Shelbery* the vouchee against the second vouchee.—COKE. The judgment is well given, and there is no error but the last; and he said the record was otherwise, that judgment was given against the second vouchee.

But

But he moved, that the writ of error was not well brought, for it varieth from the principal record; for in that the plaintiff is named *Shelbury*; and here the writ is brought by the name of *Shelbery*, so *e* for *u*: and in *Trin. 25. Eliz.* a recovery was against one by the name of *Bird*, and he brought a writ of error by the name of *Burd*; and for this variance the writ did abate. 12. *Affize*, 2. 26. *Affize*, 31. Another variance: That the record was of lands in *Colchester*, and the writ of error supposeth the land in *Colcester*; and the writ being merely founded upon the record, for these variances he prayed it might abate.—But notwithstanding these exceptions the judgment was reversed.

SHELBERY

against

BUSSARD.

A variance in spelling where the words have the very same sound is not material.

Post. 198.

25. Edw. 3. 43.

1. Roll. Ab. 797.

2. Roll. Ab. 329. 8. Mod. 31. 2. Hawk. 422. Cowp. 129. Doug. 194. 402.

Porry against Allen.

CASE I.

Hilary Term, 32. Eliz. In the Common Pleas.

Trinity Term, 30. Eliz. Roll 611.

DEBT upon a lease for years. It was found by special verdict, that one *Ball* being lessee of these lands for forty years, let them to *Gibson* for thirty years; and he let them to *Porry* the plaintiff for nineteen years, rendering 10l. rent: and afterwards articles of agreement were made between *Ball* and *Gibson*, that *Porry* should have and hold these lands and other lands for three years, rendering a greater rent; to which articles *Porry* doth agree at another time and place, and occupieth the land accordingly; and after let these lands to the defendant for seventeen years, rendering rent. The three years expired, afterwards *Gibson* grants his term to *Cornwallis*, who enters in 29. *Eliz.* And for rent behind, after his entry, the action was brought: and it was argued by *HAMMOND* of the one part, and *HARRIS* of the other.—First question, If this was a surrender by this agreement? Second, If a surrender may be, as this case is, by one termor to another, out of which his term is derived, because one term cannot drown in another?—But all THE JUSTICES held clearly, that this cannot be a surrender; for the words and the acts between strangers can make no surrender. And this agreement that *Porry* shall hold the land is a void agreement for a stranger to take benefit by it. And *ANDERSON* held clearly, that an agreement or covenant made between *J. S.* and *J. N.* that *J. D.* shall have such land for years; this being made between strangers cannot amount to a lease. So if *J. S.* covenants with *J. D.* that his executors shall have such land for twenty-one years, this cannot amount to a lease; for they are in this degree as strangers: and for this point principally, they all held it can be no surrender.—And for the other point, they also held, that this can be no surrender; for when lessee for twenty years maketh a lease for ten years, the second lessee cannot surrender to the first lessee, for ten years cannot be drowned in twenty.—And it was adjudged for the plaintiff.

An agreement between the lessor and a stranger that the lessee shall have a new lease, is no surrender. Post. 302. 488.

2. Roll. Abr.

497.

1. Co. 155. a.

1. Leon. 177. 303.

Co. Lit. 273.

3. Bac. Ab.

420. 458.

Brooksbie's

CASE 2.

Brooksbie's Case.

If the next avoidance of a church be granted to two, one of them may release to the other before the avoidance happens. Post. 600.

Moor, 467.
Dyer, 26. 244.
1. Leon. 167.
1. And. 15. 223.
Godb. 112.
Owen, 131.
2. Bac. Abr. 657.
10. Co. 48.
2. Wilf. 196.

QUARE IMPEDIT. Upon the declaration it appeared, That a grant of the next avoidance was made to him and one *H. B.* and after the church became void, *H.* released to the plaintiff all his estate, right, and title; and he being disturbed, brought a *quare impedit* in his own name only. After verdict, this matter was alledged in arrest of judgment, that the release after avoidance was void; for it is a thing in action, which cannot be granted or released from one to another; but a release before avoidance is good.—Being argued by *HARRIS* and *FENNER*, *serjeants*, on the defendant's part, and by *DREW* and *BEAUMONT* on the plaintiff's part, it was adjudged against the plaintiff, that the release was void; for after the avoidance it is merely a thing in action and so annexed to the person, that it cannot be granted or released.—And they commanded the roll of *Stafford's Case* to be searched; but no judgment was there entered: *Vide Dyer*, 282.

CASE 3.

Walter Moile's Case.

A new writ allowed to executors in *quare impedit* by *journeis accompt*.

6. Co. 10. b.
1. Vent. 235.
Ed. Rayn. 432.

COOPER moved that *Walter Moile* had brought a *quare impedit*, and died pending the writ; and he prayed to have another writ by *journeis accompt* for his executors; for he said he could not have it but by the allowance of the Court.—And *THE COURT* granted it; but said, "Regard well if it lieth in this case or not; and in what form the writ shall be."

CASE 4.

Anonymous.

A. fi. fa. may be executed on goods *bonâ fide* sold after the award of the writ.

Post. 181. 440.

2. Co. 171.
Cro. Jac. 451.

Sid. 271. Carth. 419. Gilb. Ex. 13. 6. Mod. 225. 1. Salk. 320. 2. Stra. 751. 1. Bac. Abr. 162. 1. Term Rep. 729.—By 29. Car. 2. c. 3. no writ of execution shall bind the property but from the time of its delivery to the sheriff.

COOPER desired the opinion of the Court, that if a *fi. facias* be directed to make execution of goods, and after the *teste* of the writ, and before the sheriff executes it, the party sells the goods *bonâ fide*, if they can now be taken in execution.—*THE COURT* held they might; for by the award of execution, the goods were bound, so that they may be taken in execution, into whose hands soever they come.—And *WALMSLEY* said, so it was ruled in a case at *Hertford* term, wherein he was of counsel.

CASE 5.

Bullock against Sir John Smith.

A special plea amounting to the general issue is bad.

Co. 10. 91. a. c.
Ant. 168.
Post. 484. 504.

ACTION SUR TROVER of six oxen in *London*, and there converted. The defendant said, he seized them in the manor of *D.* in *Essex*, as goods waived there; and so justifieth, *ABSQUE HOC* that he was guilty in *London*.—*PER CURIAM.* It is no plea; for it amounts but to the general issue, containing no matter local to make the place material.

Easter

Easter Term,

32. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*Sir Francis Gawdy, *Knt.*John Clench, *Esq.*Edward Fenner, *Esq.*} *Justices.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*

Marsh against Astry.

CASE 1.

ACTION UPON THE CASE. "Whereas he had brought a writ of entry against *Champion*, for certain lands in *East-Barnet*, directed to the sheriff of *Hertford*, returnable *Ostabis Martini*, and delivered it to the defendant, being under-sheriff of the said county, to be executed *in forma juris*, and gave him 2s. for executing it; and that such a day he had caused the said *Champion* to be summoned according to the writ; yet *falsè & malitiosè* intending to deceive the plaintiff, and to hinder him of his recovery of the said lands, did not return the said writ of summons at the said day of *Ostabis Martini*; PER QUOD he retardatus *fuit* of his recovery of the said lands, to his damages of 1000l." Upon not guilty pleaded, it was found for the plaintiff.—COKE moved in arrest of judgment, that this action being for *non-fa-fans*, i. e. for not returning the writ, the action lieth not against the under-sheriff, but ought to be brought against the sheriff himself; for he is responsible for all things concerning the office; and he relied upon 19. *Hen. 6. pl. 29. 41. Aff. 12. 21. Edw. 3. pl. 46.*—Secondly, It was not averred that he was under-sheriff, and continued in the office at the said day of *Ostabis Martini*, for otherwise the action lieth not against him.

Sed non allocantur. For first, The under-sheriff for a tort done by himself may be punished. And here it is alledged, that he *falsè & malitiosè* intending to delay the plaintiff of the execution of his writ, did not return it: so it is as an embezzling of the writ, for which he is punishable; as 19. *Hen. 6. &c.* Also he is charged in this action, for that he took money to return it, and did not.—And to the second exception, it shall be intended that he continued in the office, for that he was under-sheriff when the writ was delivered to him. And it is alledged, he caused the summons to be made, and did not return it at the day; by which it shall be intended that the authority was in him. And for this falsehood he is sued, and it is found by verdict against him.—And it was adjudged for the plaintiff.

If a writ be delivered to the under-sheriff to make a summons, and he deceitfully neglects to return the writ, an action will lie against him; for perhaps the sheriff had not notice of it, and he shall be intended under-sheriff at the time of the return.

Post. 178.

1. Roll. Abr. 1

93, 94.

2. Roll. Abr.

607.

1. Leon. 146.

See 7. Edw. 6.

c. 1.

4. Bac. Abr.

442, 443. in

notis.

Ld. Ray. 655.

3. Will. 314.

2. Bl. Rep. 333.

Doug. 40. 43.

671.

Cowper, 403.

Tilley

CASE 2.

Tilley against Anthony Wye senior.

An indictment charging that on such a day *A. percussit B.* of which he languished till such a day and died; AND THAT *G. fuit adtunc et ibidem præsens*, &c. is not uncertain, for the *adtunc et ibidem* shall refer to the day on which the stroke was given.

2. Hawk. 264.

Co. 4. 40. 2.

APPEAL of murder by *R. Tilley* of the death of *G. Tilley* his brother against *A. Wye senior*. And declareth; that *An. Wye junior*, (who was absent, and whom he would appeal, if present) 18. Feb. 30. Eliz. &c. such an hour at *D. percussit* the said *G. Tilley* with a shot of a dag, of which he languished until the 26th day of February following, upon which day he died; and that the said *Anthony Wye junior* feloniously and voluntarily him did kill and murder; and that the said *A. Wye senior fuit adtunc et ibidem præsens abettans et confortans* the said *A. Wye junior* the felony and murder aforesaid to do; &c.—**ATKINSON** for *A. Wye senior* (who was present) demurred upon this declaration in the appeal, because it is uncertain; for it is, that *A. Wye junior* such an hour and place made an assault upon the said *G. Tilley*; and there and then gave him a mortal wound, of which he died, &c. and that the said *A. Wye senior* was then present and abettant, &c. which is uncertain; for it may be he was present the same day, at the time when the assault was made, but was gone before the time of the stroke; and then he is not principal. 35. Hen. 6. pl. 48. In trespasss the defendant justifieth, that at the time of the trespasss supposed, he was parson, and took them for tithes. And it was no plea; for it may be he was at the time of the trespasss supposed, and not at the time of the trespasss done; so 35. Hen. 6. 12. trespasss for lying in wait to beat him, the defendant saith, that at the time of the trespasss supposed, and after, he was his villain: and yet not good; for it may be that he was not his villain at the time of the trespasss done. 3. Hen. 7. pl. 11. 10. Edw. 4. pl. 15. Also two days are mentioned; one the day of the stroke, and the other the day of the death; and it is alledged, that he was *adtunc et ibidem aidant*, &c. so is uncertain to which of the days it is to be referred.—**CURIA contra**. For when it is said that he was *adtunc et ibidem præsens*, &c. to the felony and murder in manner aforesaid doing, this must refer to the time of the stroke by which the felony was done.—**WRAY** said, if the indictment had been, that such a year, day, place, and hour, the said *A. Wye junior* made an assault and gave the stroke *ut supra*; and that the same year, day, and place, the said *A. Wye* who is now appealed was present; this had not been good; for it may be intended at another hour, because the hour was not mentioned: and therefore it hath been adjudged, that in such case the hour is necessary to be put into the indictment or appeal, when the felony was done; for he cannot be principal, when he is not at the same time present. But as it is now, it is well enough: for it is, that he was *adtunc et ibidem præsens*, &c. and cannot be intended but he was present at the same instant of time. And of this opinion were the other Justices; but they would advise, &c.

CASE 3.

Hedd against Chalenor.

An ejectment is good, although the name of the lessor was *Johan*, and in the lease it was *Jane*. Ante, 59.

EJECTIONE FIRMÆ. And declares upon a lease by indenture made by *Jane Beard*. The jury found, that the true name of the lessor was *Johan*, but she let the land by the name of *Jane*; and prayed the discretion of the Court.—This being moved, **WRAY, C. J.** said, the names are both one; and so it had been

1. Roll. Abr. 42. 135. Cro. Jac. 425.

adjudged before this time in this place, upon conference with the grammarians, that *Jane* and *Johan* is one name.—GAWDY said, the action is not grounded upon the indenture, but upon the lease, and the indenture is but an enforcing of it, and it is found she let, &c.—And afterwards, notwithstanding this variance, it was found for the plaintiff.

HEDD
against
CHALENOR.

Spire against Rofs.

CASE 4.

ACTION upon the 5. Eliz. c. 9. for perjury. It was found for the defendant, and nine pounds assessed for costs to him. It was moved that costs shall not be given against the plaintiff, for he sueth as a *party grieved*, and not as a *common informer*, and so not within the 28. Eliz. c. 5. But it was answered, that costs shall be here upon the 21. Hen. 8. c. 19. which giveth it upon every action upon statute.—GAWDY. This cannot be, for the 5. Eliz. c. 9. was made after that statute. *Quere of it.*

Quere, If a defendant in an action for perjury on 5. Eliz. c. 9. is intitled to costs?

Hutton, 22.
1. Brownl. 66.
2. Leon. 116.
1. And. 116.
1724. in point.

1. Salk. 30. 1. Bac. Abr. 517. 520. 2. Hawk. 390. Vide 3. Burrow,

Lewis Vanvivée against Mich. Vanvivée.

CASE 5.

DEBT upon a bond. The condition was to stand to the arbitrament of J. S. of all controversies between them. J. S. arbitrated that the defendant should deliver to the plaintiff six *Kentish* cloths, which were bartered by J. D. for the thread of the plaintiff; and the breach was assigned in this point; and after verdict for the plaintiff.—FENNER alledged in arrest of judgment, that this is out of the submission, for it appeareth not there was any controversy for it; and so void.—CURIA. It shall be intended to be in controversy, if the contrary be not shewn, and that they were in the hands of the defendant.—And it was adjudged for the plaintiff.

An award shall be intended to be within the terms of the submission, unless the contrary appear.

Herd against Burstowe.

CASE 6.

ERROR in a judgment in a *scire facias* upon a recovery in debt. —First error. Because the plaintiff sued a *scire facias* after the year to have execution by attorney, without a new warrant of attorney, which ought not to be; as 33. Hen. 6. pl. 49. 34. Hen. 6. pl. 51. But it was said, he ought at first to assign this for error, and to say that there is not any such record of a warrant of attorney, for this is a several record from the body of the record; and he ought to have a *certiorari* to certify it. To which GAWDY agreed, there being no other Justice present.—Second error. This is a *scire facias* against the bail, for the non appearance of the principal; and it is not mentioned that process was awarded against him, but that it was prayed, *et ei conceditur*; but it is not, *ideo præceptum est vicecomiti*, &c. as it ought to be; and although he that was bail doth afterwards appear, this might be without process, and so not good.—Thirdly, The name of the bailiff that served the process is not to the return of it. But it was said, that this is by statute, which doth not extend to a bailiff, but to the sheriff.—Fourth error. Judgment was given without demurrer or issue joined; and although there need not be a declaration in this case, no more than in a *per quæ servitia*, or a *quid juris clamat*, for these

A *scire facias* against bail must shew that process issued against the principal; and an issue must be joined on it, or the judgment will be erroneous.
Ante, 84. 153.

HEED
against
BURSTOWE.

these are declarations in themselves, yet there ought to be a plea to it, and the plaintiff to reply to it; and upon the pleadings there must be an issue or demurrer, and then a judgment, and not otherwise, except upon a *nihil dicit*.—For the second and fourth error, the judgment was reversed. *Vide* 10. *Edw.* 4. pl. 7. 11. *Hen.* 4. pl. 5. 25. *Edw.* 4. pl. 15.

CASE 7.

A *consistory* court may award costs; and if the cause be removed to the *arches*, the process for the costs shall not be prohibited, though the issue was triable at common law. Post. 228.

Cowper, 422.

Transam's Case.

PROHIBITION. The case was, *Transam*, parson of *Denbam*, sued one for tithes in the court of *Norwich*; and one that was parson of *Stonham*, a parish adjoining, came in for his title; and said that the land for which tithes were demanded, are within his parish of *Stonham*, and not within the parish of *Denbam*. Upon this they were at issue; and found for him, and sentence given for him. *Transam* appealed to the archbishop; and pending the appeal, costs were assessed against him in the court of *Norwich*, according to the 32. *Hen.* 8. c. 7. and process against him there: and because the issue was triable at the common law, he brought a prohibition to the court of *Norwich*. But for that no suit was there depending, but he had removed it before the archbishop by appeal, a consultation was awarded, for they might well proceed for costs: but if he had not removed it, a prohibition had well been grantable; and he might have had it, though he was party to the libel.

CASE 8.

To accuse another of having forged a writ of *quare impedit* is actionable.

Yelv. 146.

1. Hawk. P. C.

338. 3. Mod. 66. 12. Mod. 493. 496. Stra. 69.

Sale against Marsh.

ACTION for these words: "Thou hast used juggling with me, but thy juggling shall not serve thy turn, and hast forged a writ of *quare impedit* (innuendo a writ of *quare impedit*) against him and the bishop of *Coventry*." After verdict it was moved by *LEWIS*, that the words were not actionable.—*CURIA*. The first words are not actionable, but the last will well bear an action.—And the plaintiff had judgment.

CASE 9.

Dabridgecourt against Smalbrooke.

An *assumpsit* will lie on a promise to an under-sheriff to indemnify the sheriff against an escape in consideration of his delivering the warrant to a particular person.

Ante, 175.

Post. 190. 230. 271.

S. C. Owen, 79.

10. Co. 101. b.

Roll. Abr. 16.

Leon. 132.

3. Leon. 227.

1. Term Rep.

B. R. 419.

ASSUMPSIT. That whereas the defendant had recovered a debt against *Lane*, and had a *capias ad satisfaciendum* directed to the sheriff of *Warwick*, and delivered it to the plaintiff being then sheriff there, in consideration that he would make *J. S.* (whom the defendant did then name) his special bailiff to serve his process, that if the said *Lane* did escape, he would take no advantage against the plaintiff (whereas in truth the delivery of the writ and the promise was to *S.* under-sheriff of the plaintiff, and not to the plaintiff himself); and alledges *in facto*, that he at the defendant's request made *J. S.* his special bailiff, who arrested the said *Lane*, and suffered him to escape; and that the defendant against his promise had taken advantage of this escape, and had sued him and recovered so much, &c. and upon *non assumpsit* pleaded, it was found for the plaintiff.—And it was alledged in arrest of judgment, that this is no consideration; and that the promise was against the 23. *Hen.* 6. c. 10.—*CURIA*. An *assumpsit* is within the statute, and is as void as an obligation, but here it is not contrary to the statute; and

and it is a good consideration, that he should make one his special bailiff, which otherwise he would not do, nor trust him; but would have made his warrant to his own bailiff, which was sworn, and peradventure bound to save him harmless against escapes, &c.—And it was adjudged for the plaintiff (a).

DARRIDGE-
COURT
against
SMALBROOKE.

(a) Confirmed upon a writ of error to the exchequer chamber. Vide post. 271.

Purfell's Case.

CASE 10.

HE was indicted of felony before the Justices of gaol delivery in the county of *Somerset*, and outlawed upon it; and brought error, because in the indictment he is supposed to be of *London*, and the *capias* was awarded to the sheriff of *Somerset*; whereas by the statute 8. Hen. 6. c. 10. it ought to be to the sheriffs of *London*, in which he inhabited; and for this cause the outlawry was reversed (a). And exception was taken to the indictment, which was taken and found before the Justices of gaol delivery, who have not authority to take indictment unless they be justices of peace. 3. Mar. Brook. "Commissions" 24.—And for this cause the indictment was also discharged (b).

Outlawry in felony may be avoided by writ of error, if the *capias* has issued contrary to 8. Hen. 6. c. 10; and if the indictment was taken by justices of "gaol delivery," it shall be quashed.

(a) 3. Co. 59. Plowd. 137. 2. Hawk. 434.
3. Bac. Abr. 770

(b) Cro. Jac. 358. 2. Hawk. P. C. 32. contra.

Hadman and Green against Ringewood.

CASE 11.

IT was moved by TANFIELD, that the action was not well brought, because it was supposed *ad damnum ipsorum*, whereas it should be *ad damnum parochianorum*. 8. Edw. 4. pl. 6.—COKE. It may be either way. And he said the precedents are both ways, and executors shall have trespass of goods taken in the time of the testator, supposing it to be *ad damnum ipsorum*.—But afterward it was agreed that the churchwardens in whose time the goods were taken, may suppose it to be *ad damnum ipsorum*, or *ad damnum parochianorum*, at their choice; but the successors must of necessity suppose it to be *ad damnum parochianorum*.—And for this cause it was adjudged that the plaintiff *nihil capiat per billam*.

An action by churchwardens for a trespass in the time of their predecessor, must conclude *ad damnum parochianorum*.
Ante, 145.
Dalis. 105.
1. Leon. 177.
Cro. Jac. 234.
1. Hale, 512.
2. Peere Will. 126.

2. Hale, 181. 1. Hawk. 145. 2. Str. 852. Ld. Ray. 337. 5. Mod. 395. 2. Peere Will. 126.

Wolman against Tye.

CASE 12.

Michaelmas Term, 31. & 32. Eliz. Roll 532.

ASSUMPSIT. That the defendant did assume, that if the plaintiff was ejected during the term by him or any other, that he would give him forty-seven pounds; and alledged, that he was expelled during the term and judgment was given for the plaintiff, and a writ of enquiry of damages awarded and returned.—It was moved in arrest of judgment, that he alledged that he was expelled during the term, but saith not by whom.—GAWDY, Justice, at first held, that by the plea of the defendant, who had pleaded a special plea, this matter was waived; and a demurrer was joined upon the plea.—But it was adjudged, that this was a thing material, and traversable; and without alledging of it the plaintiff had no cause of action, and no plea of the defendant could make it good. As in an *assumpsit* to do a thing upon request, if he doth not alledge the time and place of the request, it is not good; and advantage may be taken upon it after *non assumpsit* pleaded. Mich. 32. & 31. Eliz.—It was adjudged for the defendant.

A declaration in *assumpsit* on a promise to pay so much if the plaintiff was ejected, must alledge by whom he was ejected.
Ante, 74.
Post. 675.

1. R. Ab. 71. b.
1. Saund. 33.

CASE 13.

Harris's Case.

If an attorney sue an attorney of another court or an Oxford scholar, the defendant shall not have privilege.

Palm. 403.

Dyer, 287. Lit. Rep. 304. 1. Ld. Ray. 343. Strange, 837. 1141. Dougl. 312. 531.

ACTION upon the case was brought by an attorney of the queen's bench against *Harris*. He pleaded the privilege of *Oxford*, and prayeth, &c.—It was held he should not have it, for the plaintiff being privileged here, no other privilege shall be allowed: so if an attorney here be sued by an attorney of the common pleas, he shall not have his privilege. But notwithstanding the defendant said he would plead it at his peril.

CASE 14.

Foxall against Venables.

Parishioners cannot prescribe either in matter of easement or interest.

Post. 363. 441.

ACTION upon the case. And declares, that he is an inhabitant in *D.* in the vill of *D.* and that all the inhabitants there, time out of mind, &c. had a way to the common, &c. and the defendant stopped it, &c.

It was moved by *Massy* after verdict, in arrest of judgment, that the inhabitants cannot prescribe, but by way of usage; and he hath not alledged title to the common.

EGERTON, Solicitor. Inhabitants cannot prescribe for matter of interest, but for an easement they may; and the plaintiff need not make a title, because the action is only for the disturbance of the way: and that inhabitants may prescribe for an easement, he relied upon 2. *Edw. 4. pl. 5. & 25. Edw. 4. pl. 29.* but to profit or commodity in the freehold of another, they cannot prescribe. 7. *Edw. 4. pl. 26.* 18. *Edw. 4. pl. 3.*

GAWDY, Justice. There is no difference, but in both cases they ought to alledge an usage. 2. *Mar. Brook. "Præscript."* 100. 6. & 7. *Edw. 6. Dyer, 71.* 18. *Edw. 4. 3.*

WRAY, C. J. contra.—Et adjournatur.

CASE 15.

Bugberd's Case.

Hilary Term, 31. Eliz. Roll 4. and 488.

A writ of restitution for mean profits, and a *fi. fa. ad valentiam*, &c. may be joined, and executed on the day of the return.

Ante, 162.

Post. 468. 761.

2. Roll. Ab. 278.

ERROR in *quare impedit*, where damages were given for the queen; and the judgment was reversed, *Mich. 32 placito 44.* The plaintiff had a writ of restitution awarded for the mean profits, and a *feri facias ad valentiam de bonis & catallis* of the incumbent of the queen, and all in one writ returnable *Craftino Trinitatis*: the sheriff takes the inquisition upon the day of the return of the writ, viz. *Craftino Trinitatis* and returneth it.—And first, Exception was taken, that the inquisition being taken upon the day of the return of the writ, was void; for the day is excluded, and is only for the return of it. 31. *Hen. 6. pl. 13.* 33. *Hen. 6. pl. 45.*—Second exception. In the writ of inquisition there is comprised also a *feri facias*, which is not to be.

CURIA. The writ is well served, and varieth from the case of the exigent, 33. *Hen. 6. pl. 45.* and of the *venire facias ad diem octabis*: there the day is excluded, but not here. But if it had been taken the second day of *Craft. Trinitatis*, and before the fourth day of *Craft. Trinitatis*, it had not been good. As to the second exception, they may be both in one writ. 6. & 7. *Edw. 6. Dyer*, the like process.—And it was ruled accordingly.

Parker

Parkes against Mosse.

CASE 16.

Hilary Term, 31. Eliz. Roll 31.

ACTION SUR TROVER. The defendant pleaded a recovery against J. P. and that a *fieri facias* was awarded to the sheriff; and after the writ awarded and delivered to the sheriff, J. Parkes died possessed of the goods, and made the plaintiff his executor; and afterwards the defendant, by force of the sheriff's warrant, took these goods in execution, as bailiff to the sheriff, and delivered them to him. The plaintiff replieth, that the sheriff returned upon the writ, *Tardè*: and upon this it was demurred in law.—First question. If the party dying after the writ of execution awarded, and before it was served, if it may be served upon his goods in the hands of his executor or administrator? And it was held it might; for by the execution awarded, the goods are bound (a), and the sheriff need not take notice of his death. 26. Hen. 7. pl. 5. 6. Edw. 6. Dyer, 76.—Second question. If the false return of the sheriff shall make the bailiff punishable for that he did lawfully? for he was a bailiff errant, and a mere servant to the sheriff, and not a bailiff of a franchise. And it was held clearly that it should not; for by the execution by the bailiff, the party was discharged of the execution; and therefore, it is not reason he shall take advantage against the bailiff.—And it was adjudged for the defendant.

If a defendant die after *fi. fa.* awarded, the goods may be taken in the hands of his executor; and the officer shall not be affected by a false return. Ante, 174.

12. Mod. 130.
2. Vent. 218.
1. Ro. Ab. 893.
2. Ro. Ab. 562.
Moor, 352. 873.
1. Leon. 144.
1. Mod. 188.
Cro. Car. 149.
447.
3. Co. 171.
Cro. Jac. 451.
Ld. Ray. 675.
808. 850. 1073.

3. Peere Will. 399. 1. Term Rep. 361. 729.

(a) But now by 29. Car. 2. c. 3. no writ of execution shall bind the property but from the time of its delivery to the sheriff. 5. Mod. 377. 1. Salk. 320. Skin. 257. 2. Mod. 310. 2. Vent. 218. Burr. 271.

Williams against Ashet Ash.

CASE 17.

Trinity Term, 30. Eliz. Roll 2322.

EJECTIONE FIRMÆ. It was upon special verdict found, that the corporation of Mercers, London, were seised of the lands in question, in the several possessions of two men; and being so seised made a deed of lease to the plaintiff, and a letter of attorney to J. S. to deliver the deed and the possession. The attorney enters upon the possession of one of the men, and there delivers the deed; and after enters into the possession of the other, and there doth deliver the deed. The question was, If this were good for the land for which the second delivery was? for as to the first, it was held without question, that it shall pass; but for the second the doubt was, because one deed cannot have two deliveries. A verdict in ejectment which finds that the lessor of the plaintiff was seised of the lands in question, precludes the enquiry whether the deed was properly delivered. Ante, 167.

But THE COURT held, that as the verdict is found, this matter doth not come in question; for the jury found that the corporation was seised; and being so seised made the deed; and then there is no impediment but that the delivery shall be good for all, for it shall not be intended but that the two men had possession only as tenants at will to the corporation; and then the delivery of the lease in one place is good for all; and it shall not be intended that they had an estate for years or life, except it be so shewn. And here the defendant would have pleaded entry after the verdict in abatement of the writ: but it was held clearly he had not day to plead it, but is put to his *audita querela*.—And judgment was given for the plaintiff.

CASE 18.

Sir Francis Willoughby and Ralph Sacheverel against
Patrick Sacheverel, &c.

Trespass laid with a *continuando* is good, notwithstanding an intermediate entry by the plaintiff.

ATTAINT. Upon evidence it was moved, that whereas *Patrick Sacheverel* had brought an action of trespass against the now plaintiffs for breaking his close, and depasturing his grass with their cattle, *anno 15. Eliz.* and continuing the said trespass *diversis diebus & vicibus* until the day of the writ purchased, which was 28. *Eliz.* Upon evidence it appeared that *Sir Francis* and *Ralph* had entered and occupied for half a year, and afterward *Patrick* entered and occupied it for a time; and after *Ralph* entered, and after *Patrick* entered, and after *Ralph* re-entered and occupied it till the day of the writ purchased. The question was, If this entry by *Patrick Sacheverel* be not such an interruption of the trespass, that he shall be forced for every trespass to have several actions, or that one action with a *continuando* will serve for all? —**THE COURT** held clearly, that one action of trespass with a *continuando* will serve for all; and it may well be brought with a *continuando*.

Another question was moved, because it appeared that *Sir Francis* entered only at the first, and not after that *Patrick* had re-entered; and yet the jury had found *Sir Francis* and *Ralph* guilty of the trespass, and had assessed entire damages 310*l.* and in this it was said they had found falsely, and had given excessive damages against *Sir Francis*. —**THE COURT** held clearly, that they might safely find them both guilty of the trespass. But it seemeth the damages were excessive against *Sir Francis*; and they had done better if they had found *Sir Francis* guilty only of the first entry.

CASE 19.

Utty Dale's Case.

A lease to *A.* for life, and for the lives of *B.* and *C.* is an estate *pur autre vie*, and does not determine on the death of *A.* Post. 49.

Co. lit. 41. b. is notis.

5. Co. 13. a.

1. Wood's Con. 17.

HANHAM, *serjeant*, demanded the opinion of **THE COURT** in this case. A lease is made to *J. S.* "to have and to hold, to him and his assigns for his own life, and for the life of *A.* and *B.*" *J. S.* dieth; If his estate be determined? because one cannot have a greater estate of freehold than his own life.

ANDERSON and **THE COURT** held clearly it is a good limitation, and he hath an estate for all their three lives; for although he himself cannot have an estate but for his own life, yet he may have it to grant to another, and the *habendum* for their three lives is a good limitation; and by his death the estate is not determined, but *occupanti conceditur*. And it was said by **ANDERSON** and **PERIAM**, that if tenant *pur autre vie* makes a lease for years to commence after his death, this is good, and shall prevent an occupant (*a*); for the land is bound with this interest of the lessee; and he shall have it against all others, during the life of *cestuy a que vie*.

(a) See 29. Car. 2. c. 3. and 14. Geo. 2. c. 20.

William Coke de Inner Temple *against* Ro. Bacon.

CASE 20.

AUDITA QUERELA upon a recognizance, of which there was a defeasance for payment of a lesser sum; and shewed a release of 155l. parcel of the sum contained in the defeasance, and of all actions for it.—And by all THE COURT, the release doth not extend to all, but only to the sum contained in the release; and the whole recognizance is not rehearsed, but only this parcel; and he was put to shew other releases for the residue.

A release of part of a defeasance, and of all actions, is only good for the part.

St. Auby's Case.

CASE 1.

Easter Term, 31. Eliz.—In the Exchequer.

THE case was, *The Earl of Arundel* being possessed of a term for years in lands, grants a rent to *St. Auby* for his life, issuing out of the said lands, and dieth. This is found by office, and the land now being in the queen's hand, *DREW* prayeth an allowance of this rent, the term yet having continuance for divers years.

A rent for life granted out of a term for years in lands, is a chattel, and shall be satisfied out of the term, till the one or other estate determines.

But *POPHAM, Attorney General*, moved, it was a void grant to charge the land, for he cannot have a franktenement out of a chattel; and if he hath not a franktenement according to the word of the grant, he can have no other estate, for it is not granted for any time certain.

MANWOOD, Chief Baron. Although this cannot be a grant to make a freehold, yet it shall be a grant as it may be, viz. a grant for so many years as the term endureth, if he live so long; for it is not a franktenement in law, but a chattel.—And to this opinion *GENT* and *CLERK, Barons*, inclined; but said, they would advise.

7. Co. 23. 51a

Short *against* Helyar.

CASE 2.

Hilary Term, 32. Eliz. Roll 444.

ERROR IN TRESPASS.—First, The *venire facias* bore teste upon the Sunday, which is not *dies juridicus*. Sed non allocatur, for it is helped by the 32. Hen. 8. c. 30.—Second error. Trespass was, *pro defalcatione herbarum, & herbarum conculcatione pedibus ambulando, continuando, quo ad depasturationem & conculcat' herbarum, &c.* whereas depasturing was not mentioned before.—But it was held but surplusage: and judgment was affirmed (a).

Process tested on a Sunday may be amended after verdict.

Post. 203. 781.

Moor, 684.

Cro. Jac. 162.

Strange, 138.

1. Com. Dig. 316. 1. Term Rep. 782. 1. Term Rep. in C. B. 9.

(a) See 4. & 5. Ann. c. 16.

Trinity Term,

32. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*Sir Francis Gawdy, *Knt.*John Clench, *Esq.*Edward Fenner, *Esq.*} *Justices.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Elnor's Case.

If an indictment refers, with equal uncertainty to two counties, it is void.
Ante, 101.

2. Hawk. P. C. 336.
Cases in Crown Law, 58.

ELNOR AND OTHERS were indicted upon the 8. Hen. 6. c. 9. of forcible entry. The indictment was, *quod cum in statuto parliam. tenet apud Westm. in comitat' Middlesex, &c. quod JOHANNES ELNOR and others, &c. de Slimbridge in comitat. predict' apud S. predict. in com' predict' one close, being the freehold of the Countess of W. with force and arms, &c. had entered, &c. and her expulit et disseisivit, &c.* Exception was taken to this indictment, because it is not certain in what county *Slimbridge* is, in which the land is supposed to lie; for there are two counties named before, *scil.* GLOUCESTER and MIDDLESEX, so in *com' predict'* is uncertain; and if it be referred to that which is named last, as it shall be most properly referred, then it is to *Middlesex*; and an indictment taken in the county of *Gloucester* of land in *Middlesex* is void.—And for this cause principally the indictment was held insufficient; and the parties were discharged.

CASE 2.

Dalton against Selly.

Money cannot be attached before it is due.
Ante, 172.
Post, 711.

1. R. Abr. 553.
1. Sid. 327. 3. Leon. 236. 1. Bac. Abr. 691.

DEBT. It was held *PER CURIAM*, that a foreign attachment cannot be of a debt before it be due; and therefore whereas one was indebted in a sum of money to be paid at *Michaelmas*, and it was attached before *Michaelmas*, but the judgment of the attachment was not till after *Michaelmas*, it was clearly held to be void, because it was not due when attached.

CASE 3.

Cowleigh against Edwards.

Easter Term, 32. Eliz. Roll 310.

The traverse of an immaterial matter is bad.
Ante, 168.
Post, 379-705.
342.

3. Com. Dig. 117.

FALSE IMPRISONMENT. For imprisoning him at *Bristol*. The defendant justifieth that he arrested him at *Gloucester*, by virtue of a commission of rebellion, *ABSQUE HOC* that he was guilty at *Bristol*.—And it was moved that the traverse was not good, for the cause of the justification is not local, and so might justify in the place where the action was brought; otherwise it is, if the commission had been to arrest him at *Gloucester*.—And so was the opinion of WRAY: *sed adjournatur.*

Christian

Christian Plaiice against William Howe.

CASE 4.

Hilary Term, 32. Eliz. Roll 432.

ACTION for these words: "Thou hast taken a false oath in the words? The defendant did demur in law; and it was alledged that the action lay not, for it may have a good intendment; for every judge before whom an oath is taken may be said to take a false oath, not of himself, but of another before him.—Secondly, This is not a perjury punishable here, for the 5. Eliz. c. 9. extends not to perjuries in the spiritual courts, and so is not punishable by the common law.—CURIA contra, As to the first, it cannot be intended, the plaintiff being a woman, before whom no oath can be taken: and to the second, although it is not punishable by the statute, yet it is a great defamation, so that none will credit her in any thing: as to say of a merchant "he is a bankrupt," for the discredit; and though the statute extends not to it, yet it leaves it to be punished as it was before; so that it is punishable in the star-chamber.—It was adjudged for the plaintiff.

Words action-able.—"Thou hast taken a false oath in a consistory court," import perjury. Post. 297. 429. 583. 609. Ante, 135. 1. Roll. Ab. 40. Cro. Car. 436. Hob. 283. Hard. 151. Moor, 404. 537. Noy, 34. 1. Hawk. P. C. 319.

Edwards against Watkin.

CASE 5.

Easter Term, 32. Eliz. Roll 18. or 189.

ERROR IN TRESPASS. The writ was *quare clausum fregit*, and the count was *clausa fregit*; and for this variance the judgment was reversed.

Variance. Post. 198. 2. Vern. 153. 5. Com. Dig. 24, 25. 2. Wils. 394. 2. Salk. 653. 701. 4. Mod. 246. 6. Mod. 303. 2. Ld. Ray. 1209.

Lucas against Donne.

CASE 6.

Michaelmas Term, 31. & 32. Eliz. Roll 394.

ERROR of a judgment in the court of *Helston*. He sheweth not what court it was, nor by what title it was held; and the count was in *English*.—And for these causes the judgment was reversed (a).

Judgment reversed for not shewing in what court it was given. Ante, 85.

Cowper, 18. 1. T. Rep. 151.

(a) By 4. Geo. 2. c. 26, and 5. Geo. 2. c. 27. all proceedings in law are now to be in *English*.

Devered against Ratcliffe, late Sheriff of London.

CASE 7.

Easter Term, 32. Eliz. Roll 339.

DEBT for an escape. And counts, that whereas he had a judgment in debt against one in *London*, and a *cap. ad satisfac.* against him, upon which a *non inventus* was returned, for which one of his sureties, being in prison there upon a plaint there, under the custody of the defendant, was detained in execution *secundum consuetudinem civitatis prædictæ*. as appeareth by the record there, and after he escaped, &c. Upon this the defendant demurreth.—First cause. For that it is not expressly said that there was such a custom, but only *secundum consuetudinem*, &c.—Secondly, The recognizance of the bail is joint, and only one is commanded to be detained in execution.—Thirdly, The custom is not good, for he ought to have a *scire facias* against the bail, for it is unreasonable to take him

A custom to charge the bail in execution upon the return of a *ca. sa.* against the principal, without a *scire facias* against them is void. Post. 199. 1. Roll. Abr. 1. Sid. 339. Bro. Abr. 66. pl. 85. Hob. 204. Dougl.

195. Allen, 12. 2. Leon. 29. Palm, 567. 565. 891. 1. Bac. Abr. 673. 2. Wils. 204. 2. Blac. Rep. 768.

in

DEVEED
against
RATCLIFFE.

in execution without answer; for he might plead a release of the party, or that the principal is dead, and so discharge himself, &c. —And for these causes it was held the declaration was not good, and the custom unreasonable: and the plaintiff had judgment.

CASE 8.

Wood against Payne.

Ejection de
messuagio five
tenementis, and
four acres of land
pertaining,
judgment may
be given for the
land.

EJECTIONE FIRMÆ. After verdict it was alledged in arrest of judgment, that the declaration was uncertain, viz. *de uno messuagio five tenementis*, and four acres of land to the same belonging; and for this uncertainty it was held clearly no judgment shall be given of the messuage, nor of the damages or costs, for they are intire. —But judgment was prayed for the four acres: but to that it was said to be uncertain also; for it appeareth not to which of them they did appertain. —But GAWDY said, the words (*pertaining*) are void; for land cannot properly belong to a house, as *Hill v. Grange* is; and then it is as a declaration of messuage or tenement, and four acres of land; which though it be void for the first, it is good for the land: and thereupon the plaintiff released the damages, and for the four acres had judgment. And it was said that in *Mich. 27. & 28. Eliz.* such judgment was given in *Whitton v. Roberts*.

1. Sid. 895.
Pop. 203.
2. Mod. 355.
Stiles, 364.
Cro. Jac. 125.
Hardres, 173.
Ld. Ray. 191.
317.
2. Strange, 834.
1. Barnes, 117.

1773. Vide *Cottingham v. King*, 7. Burr. 623. 2. Bac. Abr. 169. 3. T. Rep. 11.

CASE 9.

Kerry against Bower.

A plaintiff may
attach a debt re-
covered, in his
own hands,
Ante, 63.

AUDITA QUERELA. For that the defendant recovered against him this debt in this court, and was in debt to the plaintiff in another debt, he attached it in his own hands in *London*, and upon this brought the *audita querela*. —And it was clearly held, the *audita querela* did not lie; for this inferior court cannot fetch this debt out of this court; and this debt is not attachable, as it was adjudged in *Sir John Parrot's Case*. And execution was awarded.

1. Roll. Abr.
552. 554.
Dyer, 196.
3. Brownl. 60.

CASE 10.

Farr and East.

An indictment
of forcible entry
discharged for a
mis-recital of
the statute.
Post. 307.

THEY were indicted upon the 8. Hen. 6. c. 9. and three exceptions were taken to the indictment. —First, The entry is supposed to be into a house, and twenty acres of land, & *cum disseisvit*, but saith not "*inde*." Sed *non allocatur*, for it shall be intended. —Secondly, There was not *contra pacem*; which GAWDY held material. WRAY *contra*. For is *vi & armis*, &c. *et contra formam statuti*, &c. which doth imply so much. —Thirdly, The statute is, if a recovery in assise, or action of trespass by verdict, or in any other manner, &c. and these words, "*or in any other manner*," are omitted, so the statute is mis-recited. And this was held a material exception, for in this the sense of the statute is altered, for this is tyed to a recovery by verdict only; but if it had been mis-recited in a point not material, it had been otherwise: and the indictment was discharged.

Noy, 120. 125.
Cro. Jac. 32.
Stra. 443.
Ld. Ray. 582.
2. Hawk. 352.

Magdalen Chamberlaine against Thorpe.

CASE 11.

Easter Term, 32. Eliz. Roll 186.

DEBT upon a recognizance taken in London. And declareth, that the mayor there had used to take recognizances by custom of all except infants and *feme-coverts*, and upon any day except Sunday, and certain other days specially named, and this recognizance was taken before the mayor there.—TANFIELD alleged divers exceptions in arrest of judgment.—First, The custom is unreasonable, viz. to take recognizances of all persons, except *feme-coverts* and infants, and doth not except men *de non sane* memory. *Sed non allocatur*; for such may acknowledge a recognizance, and have no remedy to avoid them; and therefore they are excepted which may.—Second exception. That it is not averred that the defendant was not an infant, &c. or that the day upon which it was taken, was none of the excepted days. *Sed non allocatur*; for it shall be intended, if the contrary be not shewn by the defendant. And so THE JUSTICES said the law is clearly taken at this day upon the 1. Rich. 3. c. 1. to plead a feoffment by *cestuy a que use*.—Third exception. That none can take recognizances but Justices of record which had authority by patent, &c. as the Justices of the benches and justices of peace by commission; and the mayor is not a judge of record, but by custom. *Sed non allocatur*; for the custom is good, and the customs of London are confirmed by parliament, and are good though strange; and so it was adjudged in this court between *Mabbe and Erwing*.—Fourth exception. The custom extends as well to recognizances taken of strangers as citizens, or for matters within the city. And for this cause GAWDY held it was not good.

Custom of London to take recognizances of citizens for matters within the city, with exception to particular days and persons is good.

1. Roll. Abr. 557.
4. Co. 64.
2. Inst. 395.
Co. 4. 124. a.

See 8. Hen. 6. c. 9.

Watkins against Johns.

CASE 12.

TRESPASS for assault, battery, and breaking of a pack of cloths, and taking one cloth out of it, &c.—The defendant as to the assault and battery pleads not guilty; and as to the pack of cloths, &c. he justifieth, for that the queen granted the office of *aulnage* with the moiety of the profits of it to *W. Owen*; and that the said *Owen* by his deed, bearing date, &c. at such place, made him his deputy, and because the plaintiff did offer to sell this pack of cloths, not having the *aulnage* seal to it, contrary to the statute, he seized it as forfeited. Upon this plea there was a demurrer.—SNAGG, *serjeant*, for the plaintiff argued.—First, The plaintiff declares of the breaking of a pack of cloths, and taking a cloth out of it; and he answers to the taking of the pack, but not to the taking of one cloth out of it, which is specially mentioned.—Secondly, He reciteth not the statute which makes the office of *aulnage*.—Thirdly, He sheweth that the defendant offered to sell it contrary to the statute, and sheweth not which statute, and there are two statutes which give several punishments, viz. 27. Hen. 8. c. 8. f. 12. & 6. Edw. 6. (a) 2. Hawk. c. 6. (a).—Fourthly, He justifieth by deputation from *Owen*, but sheweth not that the office was granted to him to exercise by deputy; for this is an office of trust, and otherwise cannot make a deputy.—Fifthly, He pleadeth that *Owen* by deed dated at *Aber-*

Pleading in trespass.

(a) 2. Hawk. 349-357.
Strange, 602.
243. 1066.
Ld. Ray. 1518.
Dough. 425.

gavenny

WATKINS
against
JOHNS.

gavenny made him his deputy, but sheweth not the place where the deed was made which is issuable, for it may bear date at *Alber-gavenny*, and yet sealed and delivered at another place; and so there is no place from whence the *venue* shall come, if the deed be denied.—And for these causes the plea was held clearly insufficient: and it was adjudged for the plaintiff.

CASE 13.

Bugg and Nelson against Woodward.

A real composition to be discharged from the payment of tithes is not good, even against the parson himself, if it be not by fine or deed.
Post. 249.

2. Roll. Ab. 63.
Godb. 374.
Cro. Jac. 137.
317. 613.
H. b. 176.
3ed vide
3. Com. Dig. 91.
3. Bac. Ab. 337.
Ante, 136.

PROHIBITION. For suing for tithes in court christian: and doth suggest that one *Prettiman* was seised of the land of which the tithes are demanded; and in consideration of five pounds paid by him to the said parson (*Woodward*) *concordatum & agreatum* suit between them, that he and his assignees should hold the land discharged of tithes during the life of the parson; and that afterwards he let it to the plaintiff, and upon this a prohibition was granted. And it was held he need not make proof of it, for it was a composition with the parson himself who sued. And a consultation was prayed, for the agreement is without deed; and being for no time certain, but for the life of the parson, it cannot be good without deed; and it is only an agreement, and no grant to be discharged; and a grant of tithes to a stranger cannot be without deed (a), no more can it be to the party himself that is tenant of the land. It was ruled in the common pleas, *Wescled v. Pepper*, that a *concordatum et agreatum* between the parson and his parishioner, that for twenty shillings rent he shall have his tithes for twenty years if the parson so long live, that a prohibition lieth not; yet there it was personal, and here for life.

GAWDY, Justice. A grant for life of tithes is not good without deeds, but here it is a contract for money. 21. Hen. 6. pl. 43. Lease for years of tithes is good without deed. *Et adjournatur* (b).

(a) See 5. Geo. 3. c. 17. (b) This case was moved again, and a consultation granted.
Post. 249.

CASE 14.

Bushe's Case.

A sheriff cannot justify an escape in a civil suit, because the process was erroneously awarded.
Ante, 165. 271.
Post. 466.

DEBT upon an escape against a sheriff. He pleads *nihil debet*; and by verdict it was found, that the plaintiff recovered against *J. S.* in debt, and after the year passed, had a *cupias ad satisfaciendum* against him, and the sheriff by force of it took him, and suffered him to escape; and, If upon this matter he was chargeable for this debt? was the question.—And it was adjudged he should; for though the process was erroneously awarded, yet it was sufficient for the sheriff to arrest him; and he might justify in a false imprisonment; and therefore cannot let him at large.

Bull. N. P. 66. Moor, 274. Dyer, 175. Pop. 203. 1. Leon. 30. 5. Co. 64. 8. Co. 141. Cro. Jac. 3. 280. 289. 2. Bullst. 64. 2. Saund. 100. 3. Mod. 325. Carth. 148. 234. 5. Mod. 413. 12. Mod. 396. 2. Salk. 700. Ld. Ray. 397. 776. 1530. Stra. 509. 820. 1184. Salk. 273. 4. Bac. Ab. 451. Gilb. Ex. 82, 83.

CASE 15.

Hungate against Hamond.

If a juror who was challenged appear on the tales and try the cause, judgment shall be stayed.
2. Cro. 29.

A JUROR was challenged and withdrawn; and upon a tales awarded, and process against the other jurors, he appeared amongst them, and was sworn, and tried the issue. And this being alledged in arrest of judgment, it was held erroneous, and the judgment stayed.

Richard

Richard Cotton's Case.

CASE 16.

EJECTIONE FIRMÆ. Upon evidence it was held, that if a disseisor makes divers several leases for years, and the disseisee enters into one part in the name of all, this is good for all, for they are all derived out of one freehold; and that an entry upon part of the land is an entry into the house, which is in another part of the land.

An entry into part of lands is good for the whole.
Ante, 167.
1. R. Abr. 732.
Co. Lit. 252.

Metcalf against Deane.

CASE 17.

THE jury were gone from the bar to confer of their verdict. One of the witnesses that was before sworn on the part of Deane, was called by the jurors; and he recited again his evidence to them, and after they gave their verdict for Deane. Complaint being made to the Judge of the assises of this misdemeanor, he examined the inquest, who confessed all the matter, and that the evidence was the same in effect that was given before, & non alia nec diversa.

This matter being returned upon the *postea*, the opinion of THE COURT was, that the verdict was not good, and a *venire facias de novo* was awarded. Vide 35. Hen. 6. "Examination" 17. 11. Hen. 4. pl. 17. and BROWNLOW cited a precedent, *Leming v. Kempe*, accordingly.

1. Keb. 36. 2. Keb. 13. 2. Barnes, 352. Salk. 261. 7. Mod. 1. Vent. 97. Stra. 642. 1. Term Rep. 11. 1. Freem. 79. 249. 787. 2. Jones, 83.

A *venire facias de novo* awarded, because one of the witnesses had recited his evidence to the jury after they were charged to consider of their verdict.
Post. 411. 616.
2. Ro. 261. 715.
Moor, 452.
Co. Lit. 227. b.
Palm. 325.
2. Hale, 307.
Comb. 63.

Michaelmas

Michaelmas Term,

32. and 33. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*Sir Francis Gawdy, *Knt.*John Clench, *Esq.*Edward Fenner, *Esq.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*} *Justices.*

CASE 1.

Milward against Clerk.

A promise to the plaintiff to pay 10 l. in consideration of being discharged from the custody of the sheriff, is not void by 23. Hen. 6. c. 10.

10. Co. 99. b.
2. Salk. 28.
Cowper, 128.
1. Term Rep.
418. in point.
2. T. Rep. 569.
Ante, 178.
Post, 200.

ASSUMPSIT. And declareth, that whereas the defendant was arrested at his suit upon process, the defendant, in consideration that he should be permitted to go at large, and that the plaintiff would give his warrant to the bailiff who arrested him, to suffer him to go at large, that he would appear at the day of the return of the process, or would give him ten pounds; and alledged *in facto*, that he consented that he should be permitted to go at large, and gave warrant to the bailiff, &c. and that he did not appear at the day, for which he brought action for the ten pounds. Upon *non assumpsit*, it was found for the plaintiff.—GODFREY moved in arrest of judgment, that this was a void *assumpsit*, against the 23. Hen. 6. c. 10. for it is to suffer him to go at large contrary to that statute.—GAWDY and CLENCH, *Justices.* It is a good *assumpsit*, being made to the party who had authority to dispense with his appearance; but if the promise had been made to the sheriff, or to any other to his use, it had been within the equity of the statute.—FENNER doubted. But afterwards judgment was commanded to be entered, if other matter be not shewn.

CASE 2.

Parker against Plummer.

A devise of the "issues and profits" of land, passes the land itself.

Post, 252.

Moor, 635.

2. Co. 95. b.

Co. Lit. 4. b.

Plowd. 541.

1. Saund. 186.

Cro. Jac. 104.

5. Mod. 63. 101.

3. Bac. Ab. 410.

1. Salk. 228.

1. T. Rep. 105.

YELVERTON, *serjeant*, demanded the opinion of THE COURT. Parker having a term for seventy years, devised that his eldest son should have the use and profit of it for three years, and that afterwards his youngest son should have his lease and term, "saving that I will that my wife shall have half the *issues and profits* of the land during her life, bearing and allowing half the "charges thereof." The question was, If the wife had any interest in it, or only to have an account for the profits of the land received?—GAWDY and CLENCH. She hath an interest in the land; for to have the issues and profits, and to have the land, is all one; and so was the intent that she should have the land with the son for her life; and if she hath no interest, she can have no action; for account lieth not for want of privity.

Tibbot

Tibbott against Haynes.

CASE 3.

Easter Term, 32. Eliz. Roll 353.

ACTION for these words: "*Tibbott* and one *Gough* agreed to have hired a man to kill me, and that *Gough* should shew me to the hired man to kill me." Upon not guilty, it was found for the plaintiff.—It was moved in arrest of judgment, that an action lieth not for these words.—And so held *GAWDY*, for it is not alleged that any act was done by the plaintiff, nor any thing put in ure by him; but only a communication between him and *Gough*; but otherwise it is, if the words had been, "He hath hired a man to kill me."—*FENNER contra*; for it is an ill part, for which he might be bound to his good behaviour.—*WRAY* was absent; but afterward being present, he agreed with *FENNER*: and judgment was given for the plaintiff, against the opinion of *GAWDY*.

It is slander to charge another with an intent to do an unlawful act.

Ante, 6.

Cro. Jac. 56.

2. Lev. 205.

1. Ven. 323.

1. Stra. 195.

Westbourne against Mordant.

CASE 4.

ACTION upon the case. And declareth, that whereas he was possessed of a meadow called *Parsonage Meadow* in *W.* adjoining to a little brook there, from the 20th *Aprilis*, 31. *Eliz.* and *adhuc inde possessionatus*, the defendant the said 20th *April* put in divers loads of stone into the said brook, and by it *obstupavit aquam illam*, that it from the said 20th *Ap.* to the day of the writ purchased, overflowed his meadow, so that he could not have any benefit of it.—And after verdict found for the plaintiff, it was moved in arrest of judgment, because the nuisance is supposed to be done before the plaintiff's title did commence, so no cause of action.—*GAWDY*. The declaration is good; for an action of the case declareth the whole matter, so that it is not material when the nuisance was erected, for he that is hurt by it shall have an action. *FENNER* agreed, it may be the nuisance was not by the stopping till the running of the water, and the action being brought as the truth is, is well brought. And *WRAY* being absent, they commanded judgment to be entered, if nothing said to the contrary.

A declaration in case for a continuing nuisance, need not state when the cause of the first nuisance was erected.

Post, 109. 403.

2. R. Abr. 142.

5. Co. 101. 2.

1. Leon. 273.

1. Vent. 257.

Skin. 389.

Ld. Ray. 1563.

Sir William Waldegrave against Ralph Agas.

CASE 5.

Michaelmas Term, 31. Eliz. Roll 712.

ACTION for words. And declareth, that he was sheriff of *Suffolk*, a deputy lieutenant there, and captain of six hundred soldiers for the safeguard of the queen's person; that the defendant *præmissorum non ignarus*, and of purpose to draw him into discredit, spake these words to one *Edward Hill*, who *adunc fuit et adhuc* is his servant: "It is well known that I am a true subject, but thou serveest no true subject," *innuendo prædict. Willielmum Waldegrave*, "and that thy own conscience doth accuse thee therefore." Upon not guilty pleaded, it was found for the plaintiff; and damages five hundred pound.

The slanderous quality of words must be judged of by relation to the person of whom they are spoken; and in an action for words it shall be intended after verdict that they were

It was alleged by *LEWIS*, in arrest of judgment, that an action lieth not for these words, for he saith not that *Sir W. W.* is no true subject. Although the plaintiff saith *innuendo the plaintiff*,

spoken of the plaintiff, if it was so averred by the *innuendo*.

Post. 230. 268. 308.

1. R. Abr. 75.

these

(a) Co. 4. 15.
a. b.

these are not the words of the defendant, for perhaps *E. H.* did not serve any man, or his intent may be otherwise: and if they be intended of the plaintiff, yet they are not such words of discredit as for which action lay; for it shall not be intended that he called him traitor or rebel, but that peradventure he was disobedient to some process, or that he was accountant and made no true account; and cited *Stanhope v. Blith* (a) and *Kimzey's Case*. He being a bailiff brought an action for these words, "Thou dost serve false warrants, and deceivest the people;" adjudged that the words were not actionable; for it is not averred by it that he made false warrants, or knew they were false. And in the case of the clerk of the peace for *Gloucester*, "You make false records, and justify them for true," no action lay; for they might be false for mis-writing or otherwise. And in *Savage and Cook's Case*, circa 27. Eliz. adjudged that these words, "Thou art a papist, and not the queen's friend," are not actionable. And the *innuendo* cannot aid the matter, nor the averment that he was his servant will not serve; as it was adjudged in the case of *George v. Parker* for these words, "Thou hast broken my shop, and taken my goods," *innuendo*, "that he had robbed him of them," an action did not lie; for the first words were not actionable, and the second could not aid them.—*GODFREY contra*. And he agreed the case of *Kimzey*, and of the clerk of the peace of the county of *Gloucester*, for he was of counsel in them; for they shall be intended in a good sense, and could not be intended that they counterfeited warrants, or records: but here it shall be intended in *malam partem*, that he is no true subject, but a traitor to the queen.—Upon another day it was moved again: and *EGERTON, Solicitor*, urged, that these words being spoken of a man of such credit as the plaintiff, are to be more regarded than if spoken of a private man; and it is a rule in the civil law, "*Sermo relatus ad personam debet intelligi secundum conditionem personæ*;" and he cited the case of *Mr. Edward Boughton v. the bishop of Coventry and Litchfield*, which was for these words, "He is a vermin in the commonwealth, and a corrupt man;" and for that he was a justice of peace, and a man of good estimation, it was adjudged, after long arguments, that he should recover, and had four hundred marks damages.—Afterwards it was moved again by *COKE for the plaintiff*, that the person of whom

(b) Co. 4. 16. a.

the words were spoken being considered would bear an action; and cited *Birchly's Case* (c), when words are spoken which touch one in his duty or course of life. And these actions are for the discredit, and therefore ought to be adjudged according to the credit and place of the person of whom they were spoken. And *Trinity, 2. Hen. 8.* an action was brought by the bishop of *Winchester* for these words, "My lord of *Winchester* took me and imprisoned me till I entered into a bond of twenty pounds to the king's use;" adjudged actionable. And *Hilary, 19. Eliz. Rot. 484.* Lord *Abergavenny* brought an action for these words, "My lord of *Ab.* sent for us, and put some of us into the stocks; sent some of us unto the gaol, and put some of us into the house called Little Ease;" and adjudged actionable: but such words as in the two last cases spoken of a private person were not actionable.—*WRAY, C. J.* The words themselves for the generality of them may have a good construction and reasonable intendment, and are not actionable; but the quality of the person of whom they are spoken being considered

sidered, he being touched in his credit, and course of life, they are actionable: as to call a bishop "papist," is actionable; so to call a judge "a corrupt man;" for they concern them in their office; but to call a private man so is not actionable. And whereas it was said, that it appeareth not they were spoken of the plaintiff, but that it may be intended *E. H.* did not serve any man; as to that, the *innuendo* takes away all uncertainty in that; for so it is in all actions upon the case for words, the *innuendo* makes them spoken of the plaintiff, and the defendant is found guilty; and so is estopped to say, he did not speak them of the plaintiff.—*GAWDY.* For the certainty of the person, there is no doubt but that the *innuendo* makes them as certain as if he had said, "Sir *William Walgrave is no true subject*;" but for the generality of the words he doubted, and desired to see *Bucklie's Case*. But as to the words "true subject" he said, they could not have any other reference than that he was not true in his allegiance, or in his subjection, and cannot be intended false in other matters of account, &c.—Because *FENNER* was not satisfied, they would advise till another term; and the next term it was adjudged for the plaintiff.

WALDEGRAVE
against
AGAS.

Post. 230. 268.
Cro. Jac. 202.

Taffall against Shane.

Trinity Term, 32. Eliz. Roll 828.

CASE 6.

DEBT ON BOND. The condition was to pay 11 l. upon the 12th of Feb. Defendant pleads an accord 8th Feb. that if he paid 8 l. upon the said 12th of Feb. that he would accept it for the payment of the 11 l. and pleads a tender at the day, *et encore prius*. This being but a concord, which is no plea in debt without satisfaction, it was adjudged for the plaintiff (a).

An accord to pay a less sum cannot be pleaded in satisfaction.

9. Co. 79. a.
5. Co. 117. b.
1. R. 12. 9. Cro. Car. 193. Ray. 203. 1. Leon. 19. 2. Salk. 627.

(a) An agreement between a debtor and his creditors, that they will accept a composition in satisfaction of their respective debts, to be paid in a reasonable time, cannot be pleaded to an action brought by one of the creditors to recover his whole demand.

2. Term Rep. 24.

Thomas Dearing's Case.

CASE 7.

HE was indicted of murder.—*LEWKENER* took divers exceptions.—First, The inquisition was taken before *Th. G.* coroner of the *Lord Barkley*, but sheweth not that he was coroner of the county, or of what liberty.—Second, It is not shewn how the *Lord Barkley* can make a coroner, by patent or prescription.—Third, It is, *quod percussit cum gladio*, and saith not *felonice*.—And for these causes the indictment was discharged.

An indictment quashed for want of *felonice*, &c.

4. Co. 41.
5. Co. 121.
2. Hawk. 320.
359.

Tho. Greenleaf against Jo. Barker.

CASE 8.

ERROR of a judgment given in an *assumpsit* at *Canterbury*.—First error. That whereas the said *Jo. Barker* brought an *assumpsit*, and declared, that whereas the said *Jo. Barker* was indebted to the said *Thomas Greenleaf* by obligation in 5 l. to be paid on the 1st Nov. following, in consideration that he the 3d Nov. at the instance and request of the plaintiff, would pay him the said 5 l. without suit or trouble; he assumed to deliver him a bond, in which *J. S.* was indebted to him in 20 s. with a letter of attorney to sue for the debt. Upon this declaration, after verdict, judgment was given for the plaintiff; and upon this judgment error was brought.

FIRST ERROR. The consideration was not good, for he did no more than the law did compel him to do, viz. to pay the money

GRO. ELIZ. PART I.

A. is indebted to *B.* in 5 l. on a bond payable 1st Nov. *B.* in consideration that *A.* would pay the bond on 3d Nov. promises to deliver to *A.* the bond of *C.* for 20 s. with a letter of attorney to sue for it. *Quære*, if an *assumpsit* will lie on this consideration?

GREENLEAF
against
BARKER.

Ante, 42.

Dyer, 356. pl. 39.

1. Roll. Abr.

128. pl. 4.

1. Cro. 409.

Plowd. 5. f.

that was due before.—And so was the opinion of GAWDY and FENNER, *Justices*, for he payeth no more than was due; but if it had been paid before the day, it is otherwise: for every consideration must be for the benefit of the defendant, or some other at his request, or a thing done by the plaintiff, for which he laboureth, or hath prejudice; as 37. *Hen. 6.* to cure one; and 20. *Eliz.* in the common pleas, *Worthington v. Sydenham*, in an *assumpsit*, that whereas he was bail in the queen's bench for J. S. servant of the defendant, he such a day assumed to save him harmless; but it not being alledged, that it was at the time of the bail or before, nor at his request, but after it without consideration, it was void. 9. *Edw. 4.* concord to deliver one his own writings, is void.

SECOND ERROR. The *assumpsit* is void; for it appeareth not the plaintiff could have any benefit of it; for it is not to sue and recover the 20s. to his own use, and so is rather a charge.—And of that opinion was GAWDY.—FENNER *contra*.

THIRD ERROR. For that upon the *venire facias* only twenty-three were returned, whereas there are to be twenty-four.—GAWDY. It is helped by the statute of *jeofails*, after verdict.—FENNER doubted (a). But both conceiving there was no consideration, and so a plain error (WRAY *absente*) they were both of opinion to reverse the judgment.—TANFIELD, who was not of counsel in the case, said it was adjudged *Pasch. 23. Eliz. inter Coke et Hewit*, that in consideration he would, at the request and instance of the plaintiff, pay him twenty pounds upon a bond at the day when it was due, he assumed to deliver to him the bond: this was adjudged a good consideration.—GAWDY. That may be, for it is to deliver to him the same bond which was to be delivered upon the payment of the money; but here it is collateral: and they would advise.

(a) Post. 586.

5. Co. 36.

Cro. Jac. 647.

Cro. Car. 223.

278.

11 Brownl. 274.

Laich. 57.

CASE 9.

Rigg against Clarke.

A declaration in case for over-burthening the plaintiff's horse held ill after verdict, because it did not state how the horse was over-burthened.

2. Saund. 319.

ERROR of a judgment in an action upon the case, where Clarke did declare, that whereas he was possessed of a gelding, in consideration that he would lend his gelding to B. to carry three bushels of coals from Ware to the house of B. he promised he would not *aliter eum onerare*; and alledges, that the said B. *aliter per viam prædicti onerabat spadonem prædicti et magis penderosius onus super spadonem prædicti imposuit*. Upon non *assumpsit*, and found for the plaintiff, judgment was given, and error brought.—First error. He saith, *per viam prædicti*, whereas it should be *in via*. But this was clearly disallowed; for it is all one, and of one sense.—Second error. That it is alledged, *aliter onerabat*, and sheweth not how. GAWDY and FENNER held clearly it was error: for to enable him to the suit, he ought to shew how he over-burthened him.—And being moved again, it was adjudged, that for this cause the judgment shall be reversed; although GODFREY moved strongly that it was well enough; for it lay not in the conscience of the plaintiff how he did over-load him; nor is it material, how he did over-load him. For if he alledged in one manner, and it be found in another manner, it is found for the plaintiff; and this is after verdict. And although the declaration is faulty in form, this is aided by 18. *Eliz. c. 16*. But notwithstanding these reasons, the judgment was reversed; for it is a thing material which the plaintiff is to shew.

Kinnerfly against Smart.

CASE 10.

Trinity Term, 32. Eliz. Roll 898.

DEBT upon an obligation. The defendant pleads, that at *W.* in the county of *Warwick*, there was a communication and agreement between them for lending of money; and that the plaintiff should have so many oxen which were of such value above ten pounds *per annum*; and for the performance of this usurious contract, the bond was made, and pleads the statute of 13. *Eliz.* to avoid the bond. The plaintiff saith, that it was well and duly made upon good consideration, *ABSQUE HOC* that it was made for such usurious contract; and upon this they were at issue, and tried in the county of *Warwick*; and found for the plaintiff.

On a plea of usury to an action of debt on a bond, the trial shall be where the usury is alleged, and not where the bond was made. *Post.* 370.

1. Leon. 206.

TANFIELD. This issue is mis-tried, for it should be tried in *London*; for the issue is, that the bond was not made upon an usurious contract; and the bond was supposed to be made at *London*; and the bond being made there, the trial is to be there.

COKE and KENNERLEY contra. For the bond is confessed; but the point is, If it were made by usury, which is alleged to be at *W.* in the county of *Warwick*; and upon this is the issue taken. 8. *Edw.* 3. pl. 8. An issue being, if a deed were made by *duress*, the issue shall be tried by a *venire* of the place where the *duress* is supposed, and not where the deed is supposed to be made. 22. *Edw.* 3. pl. 15. 25. *Hen.* 6. pl. 24. *Hill.* 28. *Eliz.* Rot. 311. vel 211. in *Sibthorpe et Turnor*, this exception was taken and ruled, that the trial shall be in the county of *Essex*, where the usury was supposed to be, and not at *London*, where the deed is supposed to be made. And *Postb.* 32. *Eliz.* Rot. 303. the like rule in *Pay and Wilkinfon*.—And this being moved divers days this term, upon the last day of the term the plaintiff had judgment.

Parcel's Case.

CASE 11.

HE was indicted, that at such a day, and divers days before and after, he was a common barretor, *et perturbator pacis*; but shewed no place where, nor cause for which he is a common barretor; and these exceptions were taken by **LEWKENER**.—But **THE COURT** held it good, without any special cause shewn; and the place is not material, for it is in every place; and the trial shall be *de corpore comitatús*.

An indictment for barretry need not shew the place or the cause of the offence.

2. Keb. 410.

Litch. 194. cont.

Palm. 450. 1. Term Rep. 748.

Wilson against Jeffery.

CASE 12.

Easter Term, 30. Eliz. Roll 219.

ERROR of a judgment given in a writ of covenant.—And the principal error assigned was, that the plaintiff declared upon an indenture in this manner, *quod cum per scriptum indentatum factum inter eos testatum fuit, &c.* and doth not alledge *in facto*, that he by such an indenture did covenant.—**FENNER.** So is the common course in declarations; but in a plea in bar it is no good form. And all the prothonotaries of the common pleas certified, that so are all their precedents; and **LOE**, and other clerks of the queen's bench said, so is their course.—And the judgment was affirmed.

A declaration in covenant need not alledge that the plaintiff did by the indenture covenant, &c.

2. Roll. Rep.

210.

1. Sid. 375.

1. Saund. 274.

Cro. Car. 188.

Dougl. 667. 767.

Cro. Jac. 383. 537. 1. Bac. Abr. 545. in notis.

Cowp. 665.

Katherine

CASE 13.

Katherine Hume against Luke Ogle.

If an indictment alleges the murder to be where the mortal wound was given, and that the death happened at a different place, it is repugnant; and the defendant may demur after issue joined.

Fitz. Cor. 12.
Dyer, 38.
1. Salk. 59.
2. Hale, 188.
1. Sid. 208.
2. Hawk. 182.
265. 268. 471.
10. Mod. 86.
11. Mod. 216.
230. 254.
Holt, 355.
2. Ld. Ray. 1288.

APPEAL of the death of her husband. And declares, that the defendant, such a day, at *West-Lilburne* in the said county, gave him a mortal wound, of which, at *Wetwood* in the said county, he languished, and the same day there died; and so the said defendant, the same day and year, at *West-Lilburne* aforesaid, her said husband *modo et formâ prædictâ* *murdravit*. And although not guilty pleaded, and issue joined upon it, yet he waived it, and demurred upon the declaration (as it was clearly held by THE COURT he might). For if the declaration be not good, it is in vain to proceed to a trial; yet it was clearly held, that it is not peremptory to the defendant; for if it be adjudged against him, it is but a *respondes ouster*. And the cause of the demurrer was, that the death is supposed to be at *Wetwood*, and yet the murder is supposed to be at *West-Lilburne*, which is contrary, and cannot be; for although the stroke is supposed to be at *West-Lilburne*; yet it is not felony till his death, which was at *Wetwood*, and there the murder is supposed to be done: and the case of *Heyden*, 4. Co. 41. was cited. And as the indictment there was insufficient for the time, so here for the place, which is more material; for from this the *venire* shall come; but if it had been, *et sic murdravit modo et formâ prædictâ*, it had been good.—And LVE said, divers of the ancient precedents are, that the murder is supposed to be where the *stroke* was.—But THE JUSTICES held clearly, that the indictment was ill; for of necessity it must be at the place of his death. And although the precedents are so, yet they did pass *sub silentio*, and were not well examined, and not to be regarded, as *Heyden's Case*: and it was resolved, that there was no difference between the cases; and adjudged, that the appeal did abate.

CASE 14.

Sir Gilbert Gerrard, Master of the Rolls, against Mary Dickenfon.

Easter Term, 31. Eliz. Roll 453.

What words will amount to slander of a man's title.

S.C. 4. Co. 13. a.

(a) Yelv. 89.
Cro. Car. 140.
C. & Jac. 397.
1. Roll. Rep. 24.
1. Bull. 75.
Palm. 529.

ACTION UPON THE CASE, for *slandering his title*. And declared, that whereas he was seised of the manor of *Hely*, in the county of, &c. and Sir *Ralph Egerton* was in speech with him (a) to have a lease of it for years, and offered so much for the rent, and so much for a fine; the defendant, *præmissorum non ignara*, but intending to slander his title, said in the presence of divers, "I have a lease of the manor of *Hely* for ninety-nine years;" and published a deed of lease to divers, affirming it to be good, and offered to sell it, and all her interest in it; *ubi revera* the defendant did know it to be a forged deed: and by reason of these words Sir *Ralph Egerton* would not take a lease; nor any other; by which he lost the commodity of his land, to his damages of one thousand pound.—The defendant pleaded, that one *W. Dickenfon*, her husband, died at *Uxbridge*, &c. after whose decease *talis indentura qualis in narratione prædictâ specificatur, et quoddam scriptum exemplificationis hujusmodi talis indenturæ sub magno sigillo Angliæ sigillat*, came to the possession of the defendant amongst other writings; the which the defendant then and there did believe to be a good lease, and duly made, sealed and delivered; for which she doth justify the words, **ABSQUE HOC** that she did know it to

be a deed of a forged lease.—Upon this it was demurred in law, and argued by COKE and WARBERTON *for the plaintiff*; and by ALTHAM and SNAGG, *serjeants, for the defendant*.—As to the bar, it was held clearly by THE JUSTICES, and in manner confessed by the defendant's counsel, that it was ill; for the saith, *talis indentura qualis, &c.* so doth not answer to the deed in the declaration, for *talis* is not *eadem* (b). But as to the substance of the declaration, it was moved, that the action did not lie; for the defendant saith she had a lease, which is not to be referred to the deed of lease, but to the interest of the lease; and when she claimeth an interest, she is not punishable (c); and the cases of conspiracy, 22. *Edw. 3. pl. 1. & 40. Edw. 3. pl. 19.* and the cases of publishing of forged deeds, 9. *Hen. 6. pl. 26. 20. Hen. 6. pl. 11. 10. Hen. 7. pl. 29. 15. Edw. 4. pl. 25.* were cited, that the party is not punishable claiming an interest, or not knowing it to be forged.—And divers exceptions were taken to the declaration.—First, It is not averred that the defendant had not title.—Second, It is said, she offered to sell, but saith not to whom; so uncertain.—Third, That she published *diversis personis*, but shewed not to whom.—Fourth, It is said, that she knowing it to be forged published it; and no place shewn of her knowing, which is material and traversable; and so a place ought of necessity to be inserted.—*Sed non allocatur.* As to the matter, it was said it was sufficient to entitle the plaintiff to an action; for if one entitle a stranger to my land, and not himself, an action lieth. *Trin. 24. Eliz. Johnson v. Smith*, the case was, *Johnson* enters into a communication with *Sir H. Bedingfield* to sell him certain land, and the defendant knowing it, said in the country, that a stranger had a rent-charge out of it; by reason whereof *Sir H. Bedingfield* refused to proceed in the bargain; and *Mildmay v. Stanfield* was cited (d). So here, when she deriveth no title to herself, but in effect saith her husband had a lease, which now is a stranger, an action lieth not.—WRAY, *Chief Justice*. The words “I have a lease, &c.” shall not be construed that she had a *term* or *interest* in the lease itself, but only an indenture of lease; and is as much as if she had said, that she had an indenture of lease made to her husband in her keeping, so makes no title to herself; and being so, all will agree she is punishable. But if she had said, that she had an interest or term for ninety-nine years, and entitled herself to it, it were otherwise. But in all cases, when one doth entitle a stranger, it is not actionable, except it be shewn that some damage cometh to the proprietor by it, *viz.* that he cannot let it or sell it, &c. (e) And that an action lieth not where one doth entitle himself, the case of 17. *Edw. 4. pl. 3.* doth prove it. For if one saith *J. S.* is his villein, an action lieth not; but if he saith, “*J. S.* is villein to a stranger,” it is otherwise.—GAWDY, *Justice*. The saying “I have a lease” amounts to as much as I have an *interest* for years, for so it is intended in common parlance; and she doth not only say she hath a lease, but this is enforced by offering to sell it: but it being alledged that she published it knowing it to be forged, and so doth endamage the plaintiff, and of purpose to stop him to let, &c. it seemeth the action is maintainable. At common law, if one sue a *forged* obligation knowing it to be so, an action of the case lay (f) And although she claimeth a lease to herself, yet she publishing it knowing it to be forged, an action lieth: and although it is said, that it is

GERRARD
against
DICKENSON.

(b) Doc. Plac.

56.

Lane, 62.

4. Co. 13. b.

(c) 1. Roll. Rep.

409.

1. Sid. 79.

Cro. Jac. 164.

213.

Moor, 138.

Hob. 205.

Hetl. 161.

(d) Ante, 34.

1. Co. 177.

Moor, 144.

Post. 417.

(e) Cro. Car. 140.

Yelv. 88.

Co. 4. 13. a.

(f) Hob. 167.

Fitzg. 98. 174.

Post. 336.

Co. 4. 13. b.

not

GERRARD
against
DICKENSON.

not published as a true deed, but *quasi verum*, this is a plain affirmative that it was true.—Afterwards the plaintiff had judgment.

CASE 15.

John Hooper's Case.

The addition must be placed before the *alias dictus*; but the addition "*wife*" in an indictment against a *feme covert* is sufficient.

Post. 249. 583.

2. Inst. 669. Theol. b. 6. c. 14. f. 19. Moor, 354. 2. Leon. 183. 5. Edw. 4. pl. 41. con. 2. Hale, 177.
Co. Lit. 3. a. 2. Inst. 669. 1. Com. Dig. 33. F. 24.

JOHN HOOPER, *alias* BARTHOLOMEW, *carpenter*, and others, were indicted upon the 8. Hen. 6. c. 9.—And because the addition came after the *alias*, it was held void as to him, and the indictment discharged.—In the same indictment, one was indicted by the name of *J. the wife of J. S. of D.* and it was moved, If this were good without any other addition to the wife, of her mystery, or place of her habitation?—GAWDY held it was not.—CLENCH and FENNER *contra*.

CASE 16.

Edward Walwin's Case.

Outlawry reversed.
Ante, 85.

ERROR brought by him to reverse an outlawry upon an indictment of murder.—The error was, that in the indictment he was named *Edward Walwyn de Mackre*, and the *capias* was *de Mackreo*; and by the name of *Walweene*, whereas his name was *Walwin*: and for these causes the outlawry was reversed.

CASE 17.

Berkenhead against Nuthall.

Variance in the sum demanded between the writ and the declaration in debt is fatal.

Post. 185. 2. Wilf. 394. 2. Salk. 701. 6. Mod. 303. Cowp. 178.

ERROR upon a judgment in debt.—Error was, that in the writ he demanded one hundred and sixty-six pounds thirteen shillings and fourpence, and in the declaration he demanded one hundred and seventy-one pounds ten shillings: and for this variance the judgment was reversed.

CASE 18.

The Archbishop of York against Sir Henry Barkly.

Variance.

Cowp. 229.

ERROR upon a judgment in a *quare impedit*.—Variance was assigned between the record and the writ; for one was of the church of *Bomington* with a double *nn*, and the other was *Bonington* with a single *n*; and TANFIELD compared it to the case of attain which was overthrown, because one record was *York*, and the other *Yerk*: but *inter Colcester et Colcheſter*, in *Bird and Shelberie's Case*, (*Vide antea*, 172.) it was held to be no difference, because *h uon est litera, ſed aſpiratio*.—Another variance, because the judgment was supposed to be given before LORD ANDERSON, and his companions; whereas it was before LORD DYER, &c.—And this was held a great variance, and it was commanded to be examined, &c.

CASE 19.

Leverett against Townsend.

Either *case*, or *affſe*, may be brought for disturbance of common, as by plowing it.

Ante, 191.

Post. 466.

9. Co. 112. b.

1. Com. Dig.

199. 215.

5. El. Com. 240. 4. Burr. 2426.

ACTION upon the case. And declareth, that whereas he was seised of sixteen acres of land in *D.* and by reason of it had after harvest severed common in another parcel of land of twenty acres adjoining there every year, the defendant had plowed this land, by which he was disturbed of his common.—After verdict, it was alledged in arrest of judgment, that he having a freehold in the land, to which he claimed common, he was to have an *affſe*, and not an *action* upon the case. 2. Hen. 4. pl. 11. 8. Eliz. Dyer, 258.—But THE COURT, and COKE, who was of counsel of the

same part, held he might have one action or the other. But COKE said it was not expressed when the disturbance was made, and so might be before harvest, and then no cause of action.—GAWDY and FENNER held it well enough; for the disturbance was by plowing up the land, which was a nuisance, and would remain so always: but they would advise.

LEVERETT
against
TOWNSEND.

Warter against Perry and Spring.

CASE 20.

SCIRE FACIAS against them, as mainpernors of *Broke*. They pleaded that *B.* was dead the day of the judgment given.—THE COURT at first held it no plea; for it goeth in avoiding the judgment, and proveth it to be erroneous, which cannot be avoided but by error. But they might plead the death of *Broke* before the *scire facis*, and after judgment; for then they could not bring in the body.—But afterward the plea was received, because they cannot have a writ of error to reverse the judgment (*a*).

To a *scire facias* the bail may plead that the principal died before judgment was signed.
Ante, 183.

1. Roll. Abr.
449. 742.
2. Term Rep. 576.

1. Leon. 101. 2. Mod. 308. 2. Bac. Abr. 189. Dougl. 38. 2. Term Rep. 576.

(a) See 17. Car. 2. c. 8. and 8. & 9. W. 3. c. 11. s. 6.

Veal against Roberts.

CASE 21.

Trinity Term, 32. Eliz. Roll 676.

EJECTIONE FIRMÆ. The case was, *Stevens* was seised of two customary messuages and lands to the same belonging, and *Heydon* was seised of two other customary messuages and lands to the same belonging; and *W.* and *W.* were possessed of certain lands containing ten acres, called *Normors* (which were the land in question); all which were parcel of the possessions of the abbey of *Gloucester*. The abbot and convent let to *John Veal* "the said four messuages and lands, *necnon* the said lands called *Normors*, "*habendum et tenendum* the said messuages and lands, &c. *necnon* "the said ten acres of land, *à tempore mortis sursum redditionis*, "*forisfacturæ aut determinationis statûs et termini prædicti*" of *Stevens*, "*Heydon*, *W.* and *W.* for years, rendering rent." The estate for years in *Normors* expired; the other estates of *Stevens* and *Heydon* were in being. The question was, If the lease should commence for *Normors*?—*JOHNSON* and *SNAGG* argued it should not, till all the estates were determined; for otherwise there should be a great inconveniencè for the apportioning of the rent; and if a lease be made to commence after the death of *J. S.* and *J. D.* it shall not commence till both be dead.—*COVENTRY* and *COKE* *è contra*; and relied upon *Justice Wyndham's Case*, 5. Co. 7. 8. b. and *Pollard's Case* there cited.—*GAWDY* and *FENNER*, *Justices*, held clearly it should commence presently for *Normors*; and *GAWDY* relied upon *Adams v. Wrotteslies* (*a*), that a term in reversion shall commence not when the term is run out in time only, but also when it is expired *per surrender*, or other means.—And *FENNER* said, the case is stronger than *Wyndham's Case*; for here are several *habendums*, by reason of the word *necnon*.—Afterward, *WRAY* being present, it was adjudged accordingly.

A lease in reversion of several parcels of land, made to commence on the happening of several contingencies, shall take effect and commence respectively as those contingencies happen.

1. Saund. 18a.
2. Leon. 103.
3. Bac. Abr.
430.

(a) Plowd. 119.

Featherston against Hutchinson.

CASE 22.

ASSUMPSIT. And declares, That whereas the plaintiff had taken the body of one *H.* in execution at the suit of *J. S.* by virtue of a warrant directed to him as special bailiff; the defendant, prisoner in consideration of his being set at large, is void by 23. Hen. 6. c. 10. Ante, 19c. 1. Lut. 556; Yelv. 197. 2. Bullst. 213. Godb. 250. Heil. 175. 10. Co. 102. 3. Leon. 208. 1. Salk. 28.

A promise by a third person to pay the sheriff the debt of his

FEATHERSTON
against
HUTCHINSON.

Cowp. 128.
Douglas,
1. Ter. Rep. 419.
2. Ter. Rep. 569.

in consideration he would permit him to go at large, and of two shillings to the defendant paid, &c. promised to pay the plaintiff all the money in which *H.* was condemned. Upon *non assumpsit*, it was found for the plaintiff.—It was moved in arrest of judgment, that the consideration is not good, being contrary to the statute of 23. *Hen.* 6. c. 10. and that a promise and obligation was all one. And though it be joined with another consideration of two shillings, yet being void and against the statute for part, it is void in all. *Vide Dive et Manningham's Case*, in *Comment. f.* 60.

CASE 23.

Wolley, Dean of E. and the Chapter against Robinson.

The chapter can-
not join in tres-
pass for the pos-
sessions of the
dean.

TRESPASS. For entering into the close of the dean.—After verdict found for the plaintiffs, it was moved in arrest of judgment, that this action being brought for the possessions of the dean only, the chapter was not to join: and for this cause judgment was stayed.

CASE 24.

Warner against Young.

In trespass, a
justification to
cut trees for the
repair of a mes-
suage, by virtue
of a lease, must
shew where the
messuage is situ-
ated.

TRESPASS. For entry into a wood called *Demfil-wood* in *L.* in *Suffolk*.—The defendant pleaded, that the *Duke of Norfolk* was seised of this wood, and of a messuage and of land to the same belonging, and let to him the said messuage and lands for years by indenture; and by it did covenant, that for the reparation of the house and the fencing, he might take trees in the wood; and because part of the house was decayed, he took the trees for reparation, &c.—Upon this the plaintiff demurred, because he doth not shew the village or place where the messuage, &c. was. That if an issue was, that the messuage was not in decay, no place is known from whence the *venue* should be.—And for this cause it was adjudged no good plea, and the plaintiff had judgment.

CASE 25.

Bouche's Case.

Indictment for
an escape held
bad for not
shewing the
place where the
arrest was
made.

SUFFOLK. He was indicted, for that he being constable of the hundred of *H.* arrested one for burglary, and after at *D.* in the same county he let him escape.—And because no place was alledged where the arrest was made; and if he should plead not guilty, the *venue* should be as well from the place where the arrest was made, as from the place of the escape^(a); it was held, the indictment was void, and the party was discharged.

(a) Ante, 120.

CASE 26.

Anonymous.

The place from
whence the *vis-*
us shall come
when the offence
is committed in
a *visib.*

1. Sid. 326.
Co. Lit. 125.
2. Roll. Ab. 621.
2. Hawk. 265.
Ante, 32.

WILTS. Certain persons were indicted for entering into the forest called *Grovely-forest*, and hunting there in a place called *Denshaw-wood*. The indictment being traversed, the *venire facias* was awarded *de vicineto de Grovely*; and the jury appearing at the bar was discharged. For it was held, where a thing is supposed to be done in a place which is a village in the forest, the *venire facias* shall be awarded *de vicineto* of the same village. But if it doth not appear that it is a village, then it shall be *de vicineto* of the forest, as 47. *Edw.* 3. 6. *Hen.* 7. pl. 3. & 5. *Hen.* 7. But *GAWDY* and *FENNER* said, that if the sheriff returns, there is no such village or parish, the *venire facias* shall be awarded *de corpore comitatûs*.

Smith

Smith against Hitchcock.

CASE 27.

ACTION upon the case upon an *indebitatus est*, 19. Novemb. 32. Eliz. The defendant pleads, that he was indebted to the plaintiff in 200 l. 30. Eliz. for which he gave him his bond the same year; which sum the plaintiff had recovered against him in debt, and had execution, *ABSQUE HOC* that *adunc, antea vel postea*, he was indebted to the plaintiff *aliter vel alio modo*. Upon this plea it was demurred in law.—PUPSEY and GODFREY argued for the plaintiff, that this is no good plea; for it is but a traverse of the consideration, which is not traversable, but is to be proved upon the general issue; and this plea amounts but to a general issue: and though this be but matter of form, yet this was alledged specially upon the demurrer; and relied upon the case of 8. Hen. 6. 34. Hen. 6. the case of trespass in a warren. And this plea doth answer to the *assumpsit* but by way of argument, 8. Hen. 5. pl. 9. 11. Edw. 4.—PARTRIDGE *contra*. For this is the substance and material part of the action; and for that relied upon 12. Hen. 4. pl. 7. and *Kennerly v. Cooper*, Hill. 32. Eliz. pl. 5.—GAWDY, *Just*. In every action where wager of law lieth not, the conveyance to the action, being a thing material, is traversable; but here, because the consideration is executed, it is not traversable, as 5. Hen. 7. pl. 21. Hen. 7. pl. 13.—WRAY, C. J. and FENNER, *Just*. The consideration in an action upon the case is material, but not traversable; as in an action of *trover*, the conversion is material, but not traversable (a).—And it was adjudged for the plaintiff.

In *assumpsit*, the consideration may be traversed where it is executory; but not where it is executed.
Ante, 169.
Post, 250.
5. Mod. 314.
1. Roll. Rep. 43.
Hob. 106.
Cowp. 342.

(a) Vide ante, 97. *contra*.

Cullier and Cullier.

CASE 28.

THEY were sued in the spiritual court for incontinency, and the Judges there would examine them upon their oath (a), if they did it.—But because *nemo tenetur prodere seipsum* in such cases of defamation, but only in causes testamentary and matrimonial, where no discredit can be to the party by his oath, COKE prayed a prohibition; and it was granted.

The oath *ex officio* cannot be administered in a libel for incontinency.
Post, 26a.
Moor, 906.
3. Comm. 447.

Cro. Jac. 388.

(a) This oath is abolished in criminal matters by 13. Car. 2. c. 12.

Yeoman against Stehlack.

CASE 29.

ERROR. The entry of the warrant of attorney of the defendant was, *ponit loco*, but faith not *suo*.—But the entry being that the plaintiff *ponit loco suo*, and that the defendant *ponit loco similiter*, it is good enough: and the judgment was affirmed.

Entry of the attorney's warrant.
Dougl. 114.

Anonymous.

CASE 30.

IN a bill of perjury, the parties being at issue, COKE took exception at the declaration; which was, that the defendant *falso deposuit*, &c. but faith not *corruptè et voluntariè*; but in the conclusion of the declaration it was, *et sic falso, corruptè et voluntariè deposuit*.—But because it was not alledged at the first, when the fact was alledged, the declaration was adjudged insufficient, and that the plaintiff *nihil capiat per billam*.

In perjury on 5. Eliz. it must be alledged in the first part of the declaration that the defendant deposed *corruptè et voluntariè*.

Ante, 147.—2. Hawk. 320. 3. Bac. Abr. 100. *Rex v. Cox*, it was determined by ten Judges, that in perjury on 5. Eliz. the word "*wilfully*" is a material description, but in perjury at common law "*wickedly maliciously and corruptly*" imply "*wilfully*." See Cases in Crown Law, p. 65.

CASE 31.

Ifam and Paget against Hitchcock.

Trinity Term, 32. Eliz. Roll 989.

Defect of parties
cannot be plead-
ed in bar.

Post. 253.

2. Ld. Raym.
1018

1. Mod. 239.

DEBT upon an obligation. The defendant pleads, that the obligation was made to them and to one *Bellamy*, and that they three had an action of debt depending against him; and demanded judgment *si actio*. Upon this it was demurred.—And because the obligation made to two, upon which they counted, cannot be intended an obligation made to three; and if it be a plea, it is in abatement of the bill, and not in bar; it was adjudged without argument for the plaintiff.

CASE 32.

Blaby against Eastwigg and Eastwigg.

The death of the
defendant can-
not be pleaded
in abatement, or
alleged in arrest
of judgment
after verdict.

3. Sid. 131.

ACTION ON THE CASE. After verdict, it was alledged in arrest of judgment, that one of the defendants was dead after the day of *nisi prius*. And because the party had not day to plead it, and the Court is not to take cognizance of such informations, they regarded it not; but gave judgment for the plaintiff.

1. Roll. Abr. 768. Cro. Car. 232. Cro. Jac. 646. 4. Leon. 15.—Sed vide Cro. Car. 509.
1. Com. Dig. 76. 1. Will. 37.

CASE 33.

Thomas against Ward.

Trinity Term, 32. Eliz. Roll 947.

Quere, If where
one of the parties
to a lease agree
that he will
do an act
*sub pænâ foris-
facturæ* his in-
terest therein, it
shall be constru-
ed mutually,
and thereby
form a condition
instead of a
covenant.

Post. 385.

1. Roll. Abr.
408.

2. Cro. 393.

1. Leon. 246.

2. Com. Dig.
438.

1. Wood's Con.

272.

Dough. 620.

EJECTIONE FIRMÆ. The plaintiff declared of a lease made to him of the manor of *Middleton-Cbeney* by *A. B.* and *C.* The defendant doth entitle himself by a lease of the *bishop of Rochester*, long time before the lessors of the plaintiff, &c. The plaintiff by replication confessed the lease, but that it was by indenture; and the defendant by it did covenant, that he should not put out or disturb any of the tenants of their tenancies inhabiting there within the said manor, doing their duties according to the custom of the manor, *sub pænâ forisfacturæ* of his interest: and sheweth, that for that the defendant had ousted one *Ann Green*, *unam tenentium et inhabitantium ibidem*, of the tenement parcel of the said manor *nuper in possessione et occupatione dict. A. Green*; for this cause the bishop entered for condition broken, and let it to the lessors of the plaintiff. And upon this the defendant did demur in law.—And the cause alledged was, that this is no condition, but only a covenant; for they are the words of the lessee only, and not of the lessor. But if the words had been, “it is covenanted between them, &c.” it had been otherwise. 28. Hen. 8. Dyer, 7.—Upon this difference, *HOUGHTON contra*. Although the words sound as the words of the lessee, yet being by indenture, they are the words of the one and other; and although the words sound in covenant, yet the intent of them is to defeat the estate, which cannot be by covenant, but by condition. *Browning vs. Beeson* (a). And he cited a case to be adjudged between *Hill* and *Lockson*; where the lessee covenanted to grind his corn at the mill of the lord, and other covenants; and in the end of the indenture he did covenant to perform all the covenants within the same, &c. *sub pænâ forisfacturæ*; and for not grinding his corn, &c. the lessor entered, and adjudged for him: and relied also upon 21. Hen. 6. pl. 51. 32. Edw. 3. “Annuity” 30. where the words of one in a deed shall be construed the words of the other.—And of that opinion were *WRAY* and *GAWDY* clearly.

TANFIELD

But **TANFIELD** moved, though it be a condition, yet the breach is not sufficiently shewn.—First, Because he said, that he ousted *Ann Green*, one of the tenants and inhabitants there, out of the land *nuper in possessione et occupatione A. G.* and it may be, she was tenant at will, or had no lawful estate but by disseisin, and it ought to have been *nuper in tenurâ et occupatione A. G.*—Secondly, That he ousted *A. G. quæ fecit debitum suum* before expulsion, which may be she did it at once, and not always, as she ought to do.—Thirdly, It is not said she did her duty according to the custom of the manor, but *quod fecit debitum*; which may be intended only in doing reverence, and not in doing her duty according to the custom of the manor.—And these and other faults were held incurable; and thereupon it was adjudged for the defendant.

THOMAS
against
WARD.

The breach of a condition not sufficiently shewn.

Smith against Bernard.

CASE 34.

DEBT upon an obligation. The defendant pleads outlawry in the plaintiff, and concludes in abatement. The plaintiff pleads *nullius in record*. The defendant had day to bring in the record, and did fail at the day.—And because it was debt upon obligation, in which outlawry goeth in bar, he failing of the record, the plaintiff had judgment: but otherwise it is in debt upon contract; for there the queen shall not have it.

Final judgment shall be given on a plea commencing in bar, tho' it conclude in abatement.
Co. Lit. 128. b.
Dyer, 227.

1. Lev. 312. 1. Vent. 136. Salk. 3. 2. Will. 367. 3. Bac. Abr. 76a.

Gunnell against Bradish.

CASE 35.

AVENIRE FACIAS issued, bearing date the seventh of *July*, and was returnable the sixth of *July*.—And because this was a judicial process, and may be returnable *de die in diem*, it was held, it may be well amended. And it was said, that it is usual in the common pleas, if a judicial process bears *teste* upon Sunday, to amend it.

Process tested after its return is amendable within 32. *Hen. 8. c. 30.*
Ante, 183.
Post, 543.

2. Cro. Jac. 162. 442. Noy, 57. 1. Str. 138. 1. Com. Dig. 316. 3. Bac. Abr. 273.

Sir George Fermor against Brooke.

CASE 36.

ACTION UPON THE CASE, for erecting a bake-house in *Tossiter*. And declares, that whereas time out of mind, &c. there had been a manor called *Tossiter* in the same county; and for the same time, there had been a town of *Tossiter*; and that all the land within the said town of *Tossiter* had been holden of the said manor, of which he is lord; and that he and all his ancestors, and all those whose estate, &c. had used to have a bake-house, and a baker there, to bake white-bread and horse-bread for all the inhabitants there, and strangers passengers; and that none by the said time, &c. had used to have a bake-house there, but by their appointment; yet the defendant had erected a bake-house there, *ad nocumentum suum*. The defendant taketh all by protestation, except that he confessed, that there is such a town; and pleaded, that at the time when he erected his bake-house, that there were three bakers there, and that he was an apprentice to the trade, and that he set up the bake-house for the benefit of all persons, as it was lawful for him to do.—And upon this plea the plaintiff demurred; and it was argued by **FRANCIS MORGAN** for the plaintiff, and **BUCKLEY** for the defendant.—And it was adjudged for the plaintiff;

A prescription that the inhabitants of such a vill in a manor shall not bake elsewhere than at a particular bake-house in the same town, will be good.

1. Roll. Abr. 559.
3. Co. 123. b.
1. Leon. 142.
Ow. 67. cas.
1. Strange, 465.
1. Bac. Abr. 675.
Cowp. 17.
Douglass, 218. 221.

FARMON
against
BROOKE.

plaintiff; for the custom is between the lord and his tenants, which by indenture may have a good and lawful beginning; and peradventure their lands were given to them upon this condition; and it is reasonable that the lord maintaining a bake-house, that for this charge they should have reasonable recompence. And the plaintiff had judgment. *Vide 8. Co. 125. b.*

CASE 37.

Stretton against Browne.

if an inhabitant
in his turn re-
fuse to watch,
the constable
may put him in
the stocks.
Post. 287. 375.

Lamb. 13.
Dalt. c. 104. f. 3.
3. Leon. 208.
Comb. 243.
2. Hawk. 129.
3. Dougl. on
Elect. 41.
Cowp. 13.

FALSE IMPRISONMENT. The defendant justifieth, that he was constable of *B.* and that he appointed the plaintiff to watch there; and because he refused, he put him in the stocks. And upon this it was demurred.—First, Because the defendant did not shew that the plaintiff was an inhabitant there; and he cannot appoint a stranger to watch, neither by the statute of *Winchester*, 13. *Edw. 1. c. 4.* nor by 5. *Hen. 4. c. 3.*—Secondly, It was moved, the constable cannot imprison one for refusing to watch, but must complain to a justice of peace, and he may inflict punishment upon the refusers.—Thirdly, That he ought to shew it was the plaintiff's turn to watch.—**CURIA.** For the first cause clearly, the plea is not good But for the second, *WRAY, C. J.* held, that the constable might imprison one for refusing to watch.—**GAWDY contra.**—And for the first cause it was adjudged for the plaintiff.

CASE 38.

Bradley against Whorewood.

Variance.

1. Roll. Abr.
199.

REPLEVIN. In the writ the defendant was named *Whorewood*; and in the count, and proceeding after, he was named *Horewood*; and this variance after verdict was alledged in arrest of judgment.—But notwithstanding it was held good; for it is as if there were no original, which is helped by the statute; and if it be said a variance, it may be amended: and the plaintiff had judgment.

CASE 39.

Wellock against Hammond.

Trinity Term, 32. Eliz. Roll 481.

A copyholder in
borough Eng-
lish surrenders
land worth 4l. a
year to the use
of his will, and
devises it to his
wife for life, re-
mainder to his
eldest son, paying
40s. to each of
his four brothers
and his sister
within two years
after the death
of his wife.
The eldest son
takes an estate
in fee, and if he
make default of
payment the

TRESPASS, The case upon special verdict was, *Thomas Wellock*, copyholder in fee of land of the nature of *borough English*, descendible to the *puisne* son and *puisne* brother, had issue four sons and a daughter; and surrenders the land to the use of his will; and deviseth the land to his wife for life, remainder to *John* his eldest son, paying forty shillings to each of his brothers and to his sister, within two years after the death of his wife; and dieth. The wife enters; and dieth. *John* enters, and payeth not the legacies within two years; but within five years he payeth them. *William* the youngest son dieth without issue. *John* surrenders the land to the use of his will, and deviseth them to his wife; and dieth. The wife enters, and takes the defendant to husband. *Richard* as *puisne* brother and heir enters; the defendant ousts him; he brings trespass; and it was found that the land was worth four pounds *per annum*. The question was, If the entry of *Richard* was lawful?

GODFREY and COKE for the plaintiff.

youngest son may enter; for the word *paying* shall be construed a limitation, and not a condition. Antc, 146.
Post. 360. 376. 378. 454. 833.

The

The first point. The land being worth four pounds *per annum*, and *John* being to pay eight pounds, what estate passeth by the devise? And they argued, that an estate for life only passeth, for no estate is limited; and the consideration is too little to make it a fee-simple. And GODFREY cited a case in 10. *Eliz.* between *Flatman and Clowton*, that it was held by all THE JUSTICES, except WESTON, accordingly: but when the consideration is of the value of the land, or near the value, it is otherwise.—Second point, If the words *paying* be a limitation or condition? And they argued it was a limitation and not a condition; for if it be a condition it is void, and to no purpose, for it shall descend to him that is heir to the condition; and so is extinct, and no remedy to compel him to pay the forty shillings; and therefore the law shall construe it a limitation of his estate, that it shall cease if he doth not pay it; and the law shall transfer it to the heir in *borough English*. And although the words sound as a condition, yet because they being so construed would be void, they shall be expounded as a limitation; and cited *Crickmer's Case*, which *vide ante*, *Mich.* 31. & 32. *Eliz. placito* 8.—SHIRLEY and JOHNSON *contra*. It is a fee-simple; for he payeth a consideration for it, and the value is not material, and cited 29. *Hen.* 8. Br. "*Testaments*," 16. 6. *Edw.* 6. Br. "*Estates*," 78. 38. *Edw.* 3. 14.—Secondly, The words are sufficient and apt to make a condition. 7. *Edw.* 6. *Dyer*, 74. 3. *Mar* 127. 18. *Eliz. Dyer*, 348. And this can be no limitation, because the lands are limited to other, if he pays not the money. And be it a condition or limitation, it is not found there was any demand of the money, and so no breach.—CURIA. It is a fee, for the value is not material, and no book speaks of the value. Secondly, It is a limitation, and not a condition; for if it be condition, it doth extinguish in the heir, and no remedy for the money; but being a limitation, the law shall construe it, that upon the non-payment of the money his estate shall cease, and then the law shall carry it to the heir by custom, without any limitation over. And in a devise it may well be that an estate in fee shall cease in one, and shall be transferred to another. Thirdly, The money was to be paid without request: and it was adjudged for the plaintiff. *Vide* 3. *Co.* 20. b.

2. *Bac. Abr.* 72. 3. *Bac. Abr.* 18. 23. 4. *Burr.* 1933. 1940. 1. *Bl. Rep.* 610. 2. *Bl. Com.* 156. *Ld. Nott.* Argument, 35. 1. *Bro. Ch. Rep.* 191. *Swinb.* 113. 4. *Bac. Abr.* 321. *Powel on Dev.* 263. *Cowp.* 836. 1. *Bro. Caf. Etl.* 194.

Scroggs against Griffin.

CASE 40.

ASSUMPSIT. The plaintiff declared, that whereas one *Brown* and another did run for a wager of five pounds, which *Brown* did win; and upon communication of it, the plaintiff did affirm, that there was disceit and covin used in the said match; the defendant *ad tunc et ibidem*, in consideration of twelve-pence delivered to him by the plaintiff, assumed, that if he could prove that there was disceit in the running, that he upon request would give him forty shillings. Upon *non assumpsit* pleaded, and found for the plaintiff, it was alledged, that request must be after the proof made.—CURIA *contra*. Proof ought always to be in the same action, but when proof is referred to a particular person; and he can do no otherwise than he doth here: the action includes proof and request. And the plaintiff had judgment.

Bennet

WELLOCK
against
HAMMOND.

S. C. 3. *Rep.* 21.
2. *Leon.* 114.
Co. Lit. 9. b. 11. a.
6. Co. 16. a.
Dyer, 371. 74.
Cro. Jac. 527.
416. 591. 599.
1. *Roll. Abr.* 834.
2. *Mod.* 25.
Bro. Test. 18.
Bro. Etl. 78.
2. *Vern.* 106. 519.
Plowd. 413. 28.
10. Co. 41.
2. *Brownl.* 68.
Gilb. on Dev.
21. 22. 119.
Cro. Car. 138.
Carth. 93. 171.
2. *Roll. Rep.*
219. 425.
Goldf. 134.
Noy, 51.
Owen, 112.
1. *Leon.* 283.
1. *Lut.* 809.
Eq. Ca. Ab. 206.
3. *Wils.* 248.
Com. Rep. 72.
123.
Ld. Raym. 829.
Salk. 242.
Stra. 129. 799.
1086. 1128.
Andr. 125.
B. R. H. 98.
10. *Mod.* 419.
3. *Com. Dig.*
24. 35.
1. *Bac. Abr.* 328.
403. 404.
156. *Ld. Nott.*
263. *Cowp.* 836.

On a promise to pay on request, if the plaintiff could prove a certain act, the action includes both proof and request.

1. *Lutwyche*,
665.
Cro. Jac. 232.
381.
Hob. 92.
1. *Sid.* 313.

CASE 41.

Bennet against Shortwright.

Trinity Term, 30. Eliz. Roll 774.

To set out the tenth sheaf is a good modus for all tithe corn, and an issue may be taken on it.

2. Leck. 101.

On a modus to pay 2d. for the milk of every cow in lieu of calves, if it appear that some farms were excepted, a consultation shall go.

PROHIBITION upon a suit for tithes of corn, wool, and calves. And for the corn makes suggestion, that they had used in the parish to pay the tenth sheaf in satisfaction of all tithes for corn to the parson; and that he set them out, and the parson had them; and ministered this plea in the court christian, and they would not allow it. It was held by THE COURT, it was a good suggestion; for if he set out the tithes, and the parson would not take them, there is no reason he should be charged again. And therefore GODFREY said he would take issue upon it: and it was held he might.—For the wool, he made another suggestion. For the calves, he said, they used to pay within the said parish, &c. two-pence for the milk of every cow in satisfaction of calves; and the proofs were, that there was such a usage for all the land, except five farms. And for this cause it was held he had failed in his prescription, for it may be these lands were parcel of the five farms; but if it had been proved that the lands were not parcel, it had been otherwise.—And for this cause a consultation was granted.

CASE 42.

Nash against Molins.

A priory discharged of tithes at its dissolution, continues so discharged in the hands of the king's patentee, and evidence that it had never paid, will prove the prescription. Post. 276.

Bund. 60. 296.
Wood's Inst.
374.
3. Burr. 1276.
Vide Perter v. Bathurst,
Cro. Jac. 559.

PROHIBITION for suing for tithes in *Backing-park* in *Essex*. And furnished, that the lands were parcel of the possessions of the priory of *Christ-Church* in *Canterbury*; and that the said prior and his predecessors had held it discharged of tithes *tempore dissolutionis*; and pleaded the 31. Hen. 8. c. 13. The defendant pleads, that the prior and his predecessors did not hold them discharged. Upon this issue was joined; and being tried at bar, it did appear upon the evidence, that the prior or his predecessors, time out of mind, never paid tithes. But no cause was shewn by unity of possession, real composition, or other cause to shew it discharged.—COKE said it was no evidence; for it is a prescription *in non decimando*.—CURIA contra. For a spiritual man may prescribe *in non decimando*, and by the 31. Hen. 8. c. 13. he shall hold it discharged as the prior held it; and if he held it discharged, *non refert* by what means; for it shall be intended by lawful means.—And the jury afterwards found for the plaintiff.

CASE 43.

Tooley against Windham.

The promise of an heir in consideration of forbearance of a suit in chancery to which he was not liable, will not support an *assumpsit*. Ante. 126. Post. 700.

1. Roll. Abr.
24. 28.

Moore, 702. 685. 1. Leon. 114. Yelv. 184. 1. Bulst. 44. Strange, 592.

ASSUMPSIT. For that there were controversies between him and the defendant for the profits of certain lands, which the father of the defendant had taken in his life-time; and that he had purchased a writ out of chancery against the defendant, to the intent to exhibit a bill against him. Upon the return of the writ for the said profits, the defendant, in consideration he should surcease his suit, promised to him, that if he could prove that his father had taken the profits, or had the possession of the said land under the title of the father of the plaintiff, that he would pay him for the profits of the said land; and said *in facto*, that he had proved that the father of the defendant had taken the profits

under

under the title of the father of the plaintiff: and upon *non assumpsit*, it was found for the plaintiff.—COKE. This is no consideration; for the suit in chancery was unjust, and then the staying of it is no good consideration; and he sheweth not how the father of the defendant did hold it, *viz.* by lease or otherwise.—CURIA. It is no consideration; for if the father of the defendant did take the profits, it is not reason his son should answer for them; and so the suit in chancery unjust, and the staying of it no good consideration: but if the suit had been for evidences, or otherwise, the staying of it had been a good consideration: but here it is for a personal *tort*; for which neither the executor or heir are to answer.—And *Trinity Term*, 33. *Eliz.* it being moved again, all THE COURT held it no good consideration; for he did not alledge he was heir or executor, and so had no colour to charge him; and if it had been so alledged, yet no cause to charge him for a personal *tort*. And it was adjudged for the defendant.

TOOLEY
against
GRIFFIN.

Post. 183.

Humphrey Smalwood, Richard Cole, and Th. Sale, *against* the Bishop of Coventry, and Marsh. CASE I.

Michaelmas Term, 32. & 33. *Eliz.* In the Common Pleas.

Easter Term, 32. *Eliz.* Roll 2065.

QUARE IMPEDIT brought by the plaintiffs as executors of *John Sale* for the archdeaconry of *Derby*, which was abated *Trin. 31. Eliz. (a)* and was now revived. And three questions were now moved.—First, The plaintiffs did count of a grant of the next avoidance made to their testator, 23. *Eliz.* by the now bishop the defendant, and made their title by it. If this grant be a good grant within the 1. *Eliz. c. 19.*? And if it be not good, if it be void against the bishop himself, or only voidable by the successor, and not by him that granted it?—Second, If the executors may maintain an action for a disturbance made to their testator by the equity of the 4. *Edw. 3. c. 7.* which giveth action for goods taken in the time of the testator?—Third, The bishop defendant pleads a presentment by himself, as patron and ordinary of *Marsh*, the other defendant; and that he was instituted and inducted for six months before the action brought; and so pleads plenarty: If this were a plenarty within the statute of *West. 2.*?—After argument by the serjeants, THE JUSTICES resolved for the plaintiffs.—First, That this grant was good against the bishop that granted it; for the statute was not made for his benefit, but for the benefit of his successor, that he shall not be prejudiced by the act of his successor. But they held that a grant of the *prochein* avoidance is within the 1. *Eliz. c. 10.* and his successor may avoid it.—Secondly, That this action was within the equity of 4. *Edw. 3. c. 7.* for it is a chattel that should go to the executor, if the disturbance had not been; and for a disturbance in their own time, they shall recover damages to the use of the testator; by the same reason, for a disturbance in the time of their testator, they shall recover damages, by the equity of the 4. *Edw. 3. c. 7.*—

A grant of a next avoidance is good against the bishop who grants it, but not against his successor; and executors may bring a *quare impedit* on it; and a presentment by the bishop for six months before it is brought is not a plenarty within the statute of Westminster.

Ante, 141.

Post. 440.

3. Co. 59.

2. Roll. Abr. 350.

Co. Lit. 44, 45.

Cro. Car. 59.

2. Inst. 357.

5. Co. 15.

10. Co. 60.

1. And. 241.

1. Mod. 204.

2. Mod. 56.

2. Bac. Abr.

353. 391.

2. Term Rep]

606.

(a) Ante, 141.

Thirdly,

Thirdly, They all held, that this is not a plenarty within the statute of *West. 2.* for it must be *ex presentatione, non ex collatione.*—And the plaintiffs had judgment.

CASE 2.

Carter against Ringstead.

Hilary Term, 32. Eliz. Roll 120.

A declaration of
uses shall be ex-
pounded in the
same manner as
a will.

S. C. 6. Co. 64.
S. Co. 118.
Coup. 600.

TRESPASS. Upon special verdict the case was, *J. Bury*, 35. *Hen. 8.* was seised of divers lands in *Odyham*, and of the manor of *Stapely* in *Odyham*, and covenanted by indenture to suffer a recovery of all his lands of *Odyham*, and of the manor of *Stapely*. and of his lands in *W.* and *L.* and that this recovery shall be of all his lands in *Odyham*, to the use of himself and his wife for their lives, and after to divers other uses; and for the manor of *Stapely* in *Odyham*, that the recovery shall be to the use of himself, and of the heirs of his body, and after to other uses: the recovery was suffered accordingly. *Bury* dieth, and his wife married *Carter*. The question was, If she shall have all the lands in *Odyham*, or all except the manor of *Stapely*?

PER CURIAM. She shall have nothing in the manor of *Stapely*; for although by the first part of the deed she is to have all the lands in *Odyham*, yet this being by way of declaration of his intent and meaning, it shall be expounded as a will, of which every part shall stand together if it may (a). And therefore it being expressly shewn, that the manor of *Stapely* shall be to other uses, the law shall expound it so, and shall not be carried to her by the first words in the deed. And so the opinion of THE COURT was against the plaintiff.

(a) 1. Co. 95. b.
Moor, 138.
Co. Lit. 373. a.
6. Co. 64. b.

CASE 3.

Clavell against Mallory.

An audit querela
upon a statute
staple lies in the
king's bench,
though it was
acknowledged
by an infant.

AUDITA QUERELA, upon a statute staple acknowledged by one within age. And it was much questioned if the suit might be in this court, or ought to be in chancery. 16. *Eliz. Dyer*, 322. And a precedent was shewn in 2. *Hen. 5* that it lieth not here, but was to be in chancery.—But divers other precedents were shewn, that suits have been upon a statute staple in this court; and it was therefore ruled, that it lieth here, for the chancery hath no more record of it than this court; for the statute doth remain with the party; and the precedents in the Book of Entries are, that suit had been here, and there is a writ for it in the Register: and therefore they resolved, that a suit might be upon it in this court, and in the queen's bench, as well as in chancery.

How the inspec-
tion of infancy
shall be pleaded.

Cro. Jac. 59.

Another matter was moved, that in the record the inspection of the infant is not mentioned, and he is now of full age; so he cannot be inspected.—But the prothonotaries said, that the entry is, *quod venit in propria personâ*, and prayeth an inspection, and the Court would advise of the proof of his age, and so is their common course; and accordingly a precedent was shewn, *Trinity*, 2. *Eliz. Roll* 194.—But THE COURT seemed to doubt of it, and would advise.

Rook

Rook against Wilmot.

CASE 4.

DEBT upon a recovery of damages in the exchequer. The defendant pleaded, that a *fieri facias* issued out of the exchequer to levy the damages, and upon it he had paid the money to the sheriff, who was discharged of his office before the return of the writ (a); but the new sheriff returned, that he *receit* such a writ so indorsed, viz. *fieri feci de bonis, &c.* the sum demanded (but the money was not brought into court). Upon this the plaintiff did demur.—And it was adjudged for the defendant, that the plaintiff should be barred; for he having once paid the money, it is not reason he should be compelled to pay it again; and the plaintiff is put to his remedy against the ancient sheriff, if he will. *Vide postea, Tr. 33. Eliz.*

In debt upon a judgment, plea that the money was levied on a *fi fa.* is good. Poit. 238.

Yelv. 44.
Litch. 589.
5. Co. 90.
Moor, 468.
4. Leon. 194.
Sav. 123.
And. 247.
Cro. Jac. 73.

2. Lev. 203. 2. Mod. 214. Salk. 223. 1. Ld. Ray. 1072.

(a) See 20. Geo. 3. c. 37. and 3. Geo. 3. c. 15. f. 9.

John Fabian against Winston.

CASE 5.

Trinity Term, 31. Eliz. Roll

TRESPASS for land in *Uxbridge*. The question was upon the avoiding of a lease upon condition for non-payment of the rent. The condition was, that if he doth not pay the rent at the feasts, in which, &c. or within twenty days after, that then, &c. And upon a special traverse the issue was, If the plaintiff by *Edm. Bedle* demanded 7l. 10s. of rent due to him for half-a-year, the twentieth day after the feast, by the space of half an hour before the sun set? And upon a special verdict it was found, that the said *Ed. Bedle* petit 7l. 10s. *pro redditu dimidii anni, ANGLICE* for half-a-year's rent, *præfato J. Fabian tunc debet pro tenementis prædictis*, and there remained demanding the rent by the space of a quarter of an hour, *et non plus* before the sun set, *tanquam ad* and after the sun-set; and that no rent was due but the half year's rent due at the feast of the *Annunciation* before. The question was, If this verdict was found for the plaintiff or defendant?—And all THE COURT held, as for the time, although it was not found to be half an hour, but a quarter of an hour, yet it was a good demand: for being demanded well enough for the time, it is not material although it be not precisely according to the traverse. But they all held this demand of the rent (then due) is not good; for he ought precisely to shew upon his demand, what rent he demands; for if it were due five years before, it was then due; and therefore he ought expressly to shew what rent, and for what time he demanded it: and although the jury found that no other rent was due, yet it is not material, for the request must be certain. And it was adjudged for the defendant.

The demand of rent must be of the precise sum due, and in pleading it ought to be expressed when it was due, but a variance as to the duration of the demand is not material. Ante, 140. 157.

1. Leon. 305.
Allen, 94.
Co. Lit. 202. 2.
Lut. 1139.
Doug. 483.

Giles Long against Heminge.

CASE 6.

Trinity Term, 30. Eliz. Roll 2024.

QUARE IMPEDIT, for disturbing him to present to the church of *Fromebellett*. And declareth of an advowson appendant to the manor of *Fromebellett*, by a feoffment of the manor by manor, and not to the *rents or services*.—Dyer, 70. b. 1. Roll. Abr. 230. 12. Coke. 104. 1. Leon. 222. Sav. 103. 1. Leon. 207. 4. Leon. 216. Doder. Adv. 42. and see Mr. Hargrave's note [1] Co. Lit. 126. b.

An advowson appendant is appendant to the demises of the Co. Lit. 122. 2. Hargrave's note

LONG
against
HEMINGE.

Thomas Long. The defendant made title to it, and traverseth, *ABSQUE HOC* that *Thomas Long* enfeoffed him of the manor, with the advowson appendant. The jury found a special verdict, "that the said *Thomas Long* was seised in fee of a capital messuage and demesne land in *Fromebellett*, and of the services of fealty, and one penny rent, by the hand of *William Coyte*, who was seised of certain lands in fee in *Fromebellett*, and held them by the said services of the said *Thomas Long*; and that the said capital messuage, lands, and services, were known by the name of the manor of *Fromebellett*; and that the said advowson had been always belonging to the said tenements, *five manerio de Fromebellett*, and that 7. *Eliz.* the said *Thomas Long*, by parole without deed, gave the said messuage, and all the said tenements, with the advowson to the plaintiff, and made livery accordingly; and afterward, 17. *Eliz.* the said *Thomas Long* granted the advowson to the defendant; and that 25. *Eliz. Will. Coyte* the tenant did attorn to the feoffment; and upon all this matter, they prayed the discretion of the Court."—THE COURT resolved for the plaintiff; for they all agreed it was a good manor, though all the tenants but one are dismembered from it (a), and when the attornment came (b) he had then the entire manor. And they said, that an advowson is properly appendant to the demesnes, and not to the services; and by the livery of the demesnes, the advowson passed, and had passed, although there had been no attornment. And it was adjudged for the plaintiff.

(a) Vide 2. Bl.
Com. 91. cont.
(b) Dougl. 281.
Ante, 39.

CASE 7.

Bishop against Harecourt.

Trinity Term, 32. Eliz. Roll 511.

The effoin day is strictly the first day of the term; but *Trinity* being a moveable term, the Court will not *ex officio* take notice of its commencement or conclusion. Post. 227.

5. Co. 37. a.
Cro. Car. 53.
Cro. Jac. 548.
1. Roll. Abr. 525.
1. Sid. 308.
1. Leon. 328.
1. Mod. 196.
1. Term Rep. 116.

ASSUMPSIT. And declared, that in consideration of, &c. the defendant did assume *ad deliberandum quandam indenturam ante finem Termini Sanctæ Trinitatis tum proxim' sequent.* and the promise was, 5. *June.* The plaintiff alledged, that *Trinity Term* incept 7. *die Junii, et finivit 26. die Junii*; and that he had not delivered, &c. Upon *non assumpsit*, it was found for the plaintiff; and it was moved in arrest of judgment, that the Court *ex officio* is to take notice of the beginning of the term, and that was the *effoin* day, which was 3. *Junii*, and then the indenture was not to be delivered till *Trinity Term* was a twelvemonth.—Of that opinion was ANDERSON; for the *effoin* day is the first day of the term, and so taken in all pleas and returns. The THREE OTHER JUSTICES *contra.* For the plaintiff had expressly alledged, that the term began the 7. *Junii*, and the defendant had not denied it; and the Court *ex officio* are not to search the rolls of the court, &c. But admitting they ought so to do, and although in law the *effoin* day is the first day of the term, and writs may be returned then, yet in common speech that is the first day when the Court sits.—And ANDERSON against his own opinion gave judgment for the plaintiff.

Hilary

33. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*

Sir Francis Gawdy, *Knt.*

John Clench, *Esq.*

Edward Fenner, *Esq.*

} *Justices.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

William Parsons, *alias Frowde, against Christopher Parsons;*
alias Frowde.

CASE 24

Trinity Term, 32. Eliz. Roll

DEBT on bond for 500l. The condition was to stand to an arbitrement. The arbitrators amongst other articles awarded, that the defendant should enjoy a house called *Bennet's-house*, of which the plaintiff was lessee for years during the term, paying to the plaintiff yearly twenty shillings; and for non-payment of this twenty shillings, action was brought. The defendant pleaded payment, and issue was joined, and found against him.—It was alleged in arrest of judgment, that this was a condition annexed to the award, and by non-payment of it his estate should cease; and not such part of the award, that for the non-payment of it debt should be upon the obligation. But THE COURT held clearly, that this was part of the award, and for non-payment of it debt might be brought upon the obligation; and so was the intent of the arbitrators.

An award that A. shall enjoy a house paying rent to B. is not a condition, upon the non-performance of which the estate shall cease.
Ante, 54.
Moor, 3.
Cro. Jac. 423.
Barries, 56.

Another exception was, that the replication was, *et prædictus Willielmus Parsons,* and saith not "*alias Frowde,*" so part of his name is omitted, and he is not intended the same person that was named before.—But THE COURT held it not material; for it being "*et prædictus Willielmus,*" that which cometh afterwards is not material, and it cannot be intended another person; and if it be, it shall be amended. And it was adjudged for the plaintiff.—NOTA.
Mich. 18. & 19. Eliz. in Tressam v. Robbins, accordingly adjudged for the first point.

The omission of an *alias dictus* will not vitiate an award.

See 9. & 10. Will. 3. c. 15. f. 2.

Robert Limmer against William Every.

CASE 25

ERROR. The error assigned was, That the said *William Every* had brought debt upon an obligation by the name of *William Every*, administrator *bonorum et catallor. A. E. durante minore ætate* of *J. E.* executor of the said *A. E.* executor of *R. Every*; and demands a debt upon an obligation of twenty-nine pounds made of the person to whom the infant's testator was executor.

An administrator *durante minore ætate* cannot bring an action for, or meddle with the goods
2. Lev. 299.

LIMMER
against
EVERY.

Hob. 246.

to the said *R. Every*, the first testator; whereas he could not bring an action by this name, but as administrator of *R. Every*.—But it was said, that administration of the goods of *R. Every* being committed to him by this name, *omnium bonorum, &c. A. E.* it may well be committed to him by this name; especially when *A. Every* did not die intestate, but made an executor. 10. *Edw. 4. pl. 1.* that by the grant of administration of the goods of the executor, administration is by it granted of all the goods of the first testator. 27. *Hen. 8. pl. 7.*—*CURIA contra*, clearly. For by this administration committed he hath no authority to meddle with the goods of the first testator. And for this cause the judgment was reversed.

CASE 3.

Wing against Earle.

Easter Term, 32. Eliz. Roll 208, or 408.

Statute miles shall be computed by the nearest and most usual way, allowing 1760 yards to each mile; and not by strait lines, as a bird or arrow may fly.

Post. 267.

Cawley, 130.

1. Hawk. 35.

3. Bac. Abr. 783.

2. Bl. Rep. 969.

(a) See this case moved again, and adjudged for the plaintiff, post. 267.

DEBT upon an obligation. The condition was, that whereas the defendant had sold certain woods to the plaintiff, growing upon certain land, called *Spalding*, in *Peasemarch* in the county of *Suffex*, if the plaintiff may enjoy it, &c. and if the ground whereupon the wood standeth be four miles from *Rie*, that then, &c. The defendant pleaded, that the plaintiff may enjoy it; and this land by the nearest and usual highway for carriages is four thousand paces, reckoning five foot to every pace, from *Rie*: upon which plea the plaintiff demurred.—*COOPER, serjeant*, argued, that the plea was not good, for he doth not answer to the condition, which is four miles; also for the miles it is mentioned in divers statutes, 2. *Hen. 4. c. 23.* 1. *Eliz. c. 15.* 23. *Eliz. c. 5.* but in statutes it shall be taken according to the intention of them, and this is according to the usual ways, and not as a bird or arrow may fly: but in bonds no such intent appeareth, and therefore it shall be according to the account of the country, and common reputation; and he answereth not to the miles, but to the paces.—*TOWSE contra*. We have pleaded so, because we will not put it upon the country, but upon the law: for it is perilous to put it upon the country, when it is a doubt how it shall be construed.—*GAWDY* and *WRAY* conceived, that to the exceptions to the pleading it was well enough; for if one thousand paces make a mile, it is good, which tantamount that it is four miles; but the doubt is, how the miles shall be construed; for *WRAY* said, in the case of *Cambridge*, it was held that a mile shall be certain, and accounted by the most near way, and shall not be taken as a bird shall fly (a).

CASE 4.

Foster and Wilson against Mapes.

Trinity Term, 32. Eliz. Roll 71.

If one party executes an indenture, it shall be his deed, though the other party does not execute it.

Hob. 35.

Co. Lit. 229. 2.

COVENANT upon an indenture. The defendant pleads *non est factum*; and the jury found, that this deed indented was made between the plaintiffs and the defendant, and that the defendant did seal his part, and delivered it to the plaintiffs; but they did not deliver their part, &c. *Et si, &c.*—And THE COURT without argument held clearly, that it was a good deed to charge the defendant. And *FENNER* said, it hath been adjudged, that if a man

1. Wood's Con. 233. 1. Term Rep. 86.

bargains

bargains and sells his land by indenture, and the bargainor doth deliver his part of the said indenture, and the other never delivereth his counterpart, yet it is good. And for this point they resolved to give judgment for the plaintiff.

FOSTER &
WILSON
against
MAPES.

But afterwards HOBART moved in arrest of judgment, that a sufficient breach was not assigned; for the covenant is, that whereas he had let to the plaintiffs the parsonage of *B.* that he would save them harmless, concerning it, against *M. Blunt*: and they alledge that *M. Blunt* entered upon them, and put them out; and that he was parson at the time of the entry, which is not sufficiently alledged, for it is not averred that the entry of *M. B.* was lawful; and if his entry was not lawful, it is no breach of covenant, for it is intended of a lawful interruption.

If a covenant be against the act of a particular person, interruption assigned as a breach is good, without shewing by what title. Post. 675.

CURIA *contra*. For when the covenant is to save them harmless against a person certain, he ought to defend him against the entry of that person, be it by *droit* or *tort*; for he is damnified if he be disturbed, though by wrong, as 2. *Ed. 4. pl. 18*. But if the covenant had been to save him harmless against all persons, there it shall be taken for a lawful entry or eviction; and the words "to save harmless" amounts to more than a warranty, for that is for lawful titles: but here it is to be intended that *M. Blunt* had good title; for it is alledged that he is parson, and this is of the rectory; and that he entered and let it; by which it shall be intended he had interest. And it was adjudged for the plaintiff.

1. Roll. Abr. 430.
Hob. 31.
2. Lev. 37.
2. Vent. 62.
1. Stra. 400.
1. T. Rep. 671.

Trussel's Case.

CASE 5.

HE was removed out of *London* by *habeas corpus*; and it was returned upon the writ, that he was detained there for one execution, and for divers other actions at the suit of divers persons. And it was moved to the Court, that he should be discharged of all the actions, and of the execution, for he is a person attainted of felony, and had neither lands or goods to satisfy them, and his body is not his own, but at the queen's pleasure.—And all THE JUSTICES held, that as to the actions he should be discharged, for a person attainted shall not be put to answer, nor shall be put in execution, and so are all the books. But they said they had spoken with the Justices of the common pleas, and Barons of the exchequer, who in both courts had adjudged the contrary, and upon the very matter in law, and not upon the form of pleading, but they would discharge their consciences as they had; for they found no book against their opinion; wherefore they all resolved he should be discharged of the actions: but for the execution they would advise, for then peradventure the party should lose it for ever.—But EGERTON, *Solicitor*, who moved it, said, When he is let at liberty by the act of the Court, this doth not discharge him of the execution for ever; and so it had been taken in this court.—Afterwards, *Pasch. 33. Eliz.* it was moved again, that he being attainted of felony, was let go at large, but not pardoned of the felony; and being at large, was arrested at the suit of *Ognell*, by a writ of execution upon a statute out of chancery; and afterwards he removed himself by a *habeas corpus* into the queen's bench, and removed the record of his attainder, and brought a *scire facias* against *Ognell*, comprehending all this matter,

A person attainted of felony cannot be taken in execution for debt, and shall be discharged from detainer upon *mesne* process. Sed vide contra post. 516. Ante, 164.

1. Leon. 326.
1. Bl. Rep. 33.
See *Rex v. Pedley*, Cases in Crown Law, p. 304.
Douglass. 545.

TRUSSELL'S
CASE,

Ognetl appeared, and *protestando* he was not the same person who was attainted, for plea said that he was at large, and out of prison when he was arrested upon the writ of execution; and upon this it was demurred.—And afterwards, *Trinity*, 33. *Eliz.* they all resolved that he shall be discharged of the execution, upon the statute; for being a person attainted of felony, the queen hath interest in his body, so he cannot be taken in execution for debt; wherefore they did discharge him of it.

CASE 6.

Andrews' Case of Grays Inn.

Demisit, &c.
raises a cove-
nant against the
entry of the lessor,
but not of
a stranger.
Post. 674.

GAWDY and FENNER, *Justices*, were of opinion, that upon a lease for years by indenture, by *demisit, et ad firmam tradidit*, that a covenant lieth against the lessor if he enters: but if a stranger enters, it lieth not without an express warranty; for in covenant against the lessor, upon these words he shall recover the term itself. 32. *Hen. 6. pl. 32. 9. Eliz. Dyer*, 258.

5. Co. 17. a.
173. 232. 10.

4. Co. 81. 2. Roll. Rep. 39. Palm. 388. Carth. 98. 1. Mod. 113. 8. Mod. 40.
Mod. 233. 1. Wood Con. 371. 2. Leon. 104. 2. Ld. Raym. 915. Dougl. 27. 766.

CASE 7.

Austin against White.

Words.
Ante, 2.
2 Cr. 144. 430.
Post. 289.

ACTION for these words: "Thou wert laid of the French Pox," adjudged actionable.—And FENNER said it was adjudged in this court, that for these words, "Thou wert laid of the Pox," action did lie; for it cannot be intended but of the *French Pox* (a).
Ld. Ray. 710. (a) Vide 2. Vol. Term Rep. 475. where Mr. Justice Buller is reported to have said, that this case is too loosely reported to be relied on.

Peake against Pollard.

CASE 8.

Words not
actionable.

2. Roll. 99.

ACTION for these words: "Thou art a mutinous and seditious man, and didst procure the queen's subjects to sedition."—GAWDY. The words are not actionable, for it is not said, he moved them to sedition against the queen. And to this opinion THE OTHER JUSTICES did incline: but this was only upon motion.

CASE 9.

Lacy against Reynolds.

In an action for
words, the rela-
tive fact must
be positively
averred.

Post. 308. 342.

1. Roll. Ab. 83.

Upon a bad jus-
tification judg-
ment shall be
given by con-
fession, though
the issue is mis-
joined.
Post. 213.

2. Roll. Ab. 98.

Salic. 173.

1. Burr. 292.

297. 1. Stra.

397. 2. Ld. Raym. 924.

ACTION for words, which were, "He is as very a thief as any" "is in *Warwick* gaol;" and avers that J. S. was then a prisoner in *Warwick* gaol, condemned for horse-stealing: and it was clearly held, that for these words action did lie, with this averment, but not otherwise.

After verdict this matter was alledged in arrest of judgment, that the defendant did plead the bar, *quod quidam ignotus* came to *Warwick*, and there cut the purse of J. N. and the plaintiff *sciens* this, him did receive and comfort, and by reason of it spoke the words. The plaintiff replied *de injuriâ suâ propriâ*; and upon this issue was joined, and found for the plaintiff.—It was alledged that the issue is ill joined, for this matter doth not prove the plaintiff a thief, although it doth prove him a felon.—THE COURT held, that the issue was not well joined: but they conceived, that inasmuch as he had by this confessed the

words,

words, although the issue is mis-joined, and a mis-trial, yet this is as void, and the Court shall give judgment upon his confession; and the plaintiff shall not have his damages taxed by the Court, but shall have a new writ to enquire of damages. And it was so adjudged. *Vide* 22. Edw. 4. pl. 46.

LACY
against
REYNOLDS.

Dampport against Thatcher.

CASE 10.

Michaelmas Term, 32. & 33. Eliz. Roll 519.

ERROR of a judgment given in the common pleas.—First error. Because, as it appeareth before, the record between them was removed into the queen's bench by a writ of error; and then the judgment in the *scire facias* was reversed, as to the sureties, and no judgment was given against the plaintiff; whereupon the plaintiff went into the common pleas, and shewed this matter to the Court, and prayed his judgment might be entered; and so it was, and judgment given, and entered upon record, which there remains: and this matter was assigned for error; for they had no authority to give judgment; for the record was removed from thence, before the writ of error brought, so they had no record before them to give judgment.

If *scire facias* against bail be reversed, because no judgment was entered by the Court below, the reversal stands good, though judgment be afterwards given against the principal; and the want of a *bab. cor.* or *distingas* is aided after verdict. Ante, 145. Post, 259.

GAWDY. The writ of error was to remove the record, *si iudicium inde redditum sit*; so when no judgment was given, the record was not removed, but always remains with them, so that notwithstanding they might give judgment upon it. 9. Hen. 6. pl. 4. 4. Eliz. Dyer, 206. And by this second writ of error brought, it is affirmed that the first record doth remain with them. And of this opinion were THE OTHER JUSTICES.

2. Leon. 2.

Second error. For that the writ was brought against an administrator, and saith not that the intestate *obiit intestatus*.—*Sed non allocatur*; for so is the usual form. 9. Hen. 5. pl. 6.

Third error. Because it appeareth there was no *habeas corpus* or *distingas*, whereas the trial was by verdict, for this was certified upon a writ of *certiorari* awarded.—But it was held, that this is aided by the statute of jeofails, 18. Eliz. c. 16. that after verdict judgment shall not be reversed for want of a writ original or judicial. But they all held, if there never was a *habeas corpus* or *distingas* awarded, this shall not be aided by the statute; for then they had no authority to take the jury; and they could not know if they were the jurors returned upon the first writ: but it shall be here intended there were such writs, for the jury was taken; and it cannot be intended that they would or could call them without such a writ; and upon this presumption it shall be intended there were such writs, but that they are embezzled; and this is directly aided by the statute. And the judgment was affirmed; but the judgment in the *scire facias* stood reversed as before.

Crews against Bayles.

CASE 11.

Trinity Term, 32. Eliz. Roll 149.

ERROR to reverse an outlawry after judgment in a bill of privilege.—And because no process of outlawry was awardable, for *capias* did not lie in the original, it was held a manifest error, and the outlawry reversed.

No outlawry except where a *capias* lies on the original. 1. Leon. 329.

CASE 12.

Meade against Cheyney.

Elegit granted on a *vassavit* returned.

Post 318. 530.

2. Leon. 188. Mo. 299.

THE plaintiff recovered against the defendant as executor of *Skipwith*; and upon a *feri facias* a *devastavit* was returned; and upon this he prayed an *elegit, et habuit de terris executoris*.

CASE 13.

Wickham Bishop of Lincoln against Cooper.

A bishop may prescribe in *non decimando* of a manor held in right of his bishoprick, and it is not destroyed, though granted in fee, and then re-granted to the bishop.

Ante, 206.

Post, 475.

1. R. Ab 653.

1. Leon. 248.

Moore, 425.

2. Co. 44.

3. Burr. 1276.

PROHIBITION for suing for tithes. And made suggestion, that he and all his predecessors, &c. were seised of the manor of which the tithes were demanded, discharged of tithes during the time that it was in their possession; and shewed, that in the time of *Edward* the 6th this manor was conveyed to the duke of *Somerset*, and was afterwards regranted, and came to the bishoprick again.—FLEMING moved for a consultation; for it was a prescription in *non decimando*, which cannot be; and upon his own shewing the prescription was interrupted, and cannot be revived.—CURIA contra. For the prescription for a spiritual person is good; and the bishops of *Canterbury* and *Winchester* use to prescribe so: and the prescription is not determined when it came to the bishoprick again; for tithe is not a thing issuing out of land; and unity of possession doth not extinct them, nor a release of all the right to the land.

Wood Inst. 262.

Harvy against Thomas.

Michaelmas Term, 31. & 32. Eliz. Roll 414.

A husband seised in right of his wife makes a parol lease, and they afterwards levy a fine, and die. The donee may avoid the lease.

Ante, 130.

1. Roll. Abr.

389.

2. Co. 77. b.

1. Leon. 247.

THE case was, *Harrison* and his wife sold the land of the *feme* by deed indented, but it was not inrolled within the six months; and afterwards the *baron* alone makes a lease by parol, and then the *baron* and *feme* levy a fine to the bargainee, and die. The question was, If the donee of a fine shall avoid this lease?—And it was adjudged he should; for being made by the *baron* only, it was void against the *feme*, and no acceptance could make it good; and as it shall be void to the *feme*, so to the donee: so of a rent charge granted by the *baron*, or a recognizance by him. And so it was resolved in *Lord Mountjoy's Case*, 24. Eliz. that the recognizance of the *baron* shall not bind the donee of a fine; and the donee is in by the *feme*, and the *baron* joineth only for conformity. Vide 2. Co. 77. b.

CASE 15.

Green against Edwards.

Trinity Term, 32. Eliz. Roll 1832.

A lease to A. for years; and if he die, that then his wife shall have it during the whole residue of the term, determined by the death of A. and the limitation to his wife is void. Ante, 9.

1. And. 258.

1. Leon. 218.

Moore, 207.

1. Co. 153. 155.

THE case upon demurrer was, Land was let to J. S. for ninety years, if he liveth so long: and if he dieth within the term, that then his wife shall have it *durante toto residuo termini predicti*. J. S. dieth within the term; the question was, If his wife shall have it during the residue of the term?—And *Pascbe*, 33. Eliz. it was resolved by all THE JUSTICES, that she shall not; for the term was wholly determined, and the limitation to her was void; for as a remainder it cannot inure; for a remainder must be created with the particular estate, and is to be limited for a certain estate, viz. for years, life, in fee, &c. And here no certain estate is limited to her; for although it is limited to her during the residue of the term, and so shall be intended a lease for years, yet forasmuch as every lease for years is to have a certain commence-

ment and ending, here it is uncertain if she shall ever have it, for J. S. may outlive the ninety years, and therefore a termor cannot grant his term after his death, and so the remainder here is void.—But ANDERSON said, (a) if the wife had been party to the deed, this peradventure might have been good to her, not by way of remainder, but by immediate grant and demise for so many years which should be to come; and *durante termino* shall not be taken for the interest, but for the time: which WALMSLEY and WYNDHAM did expressly deny; for they held, it is at first void for the uncertainty when it shall commence, or whether it shall commence. And it was adjudged that the wife took nothing. *Vide* 1. Co. 155.

GREEN
against
EDWARDS.

(a) *Vide* Wright v. Cartwright, 1. Burr. 284. where Lord Mansfield controverts the propriety of Anderson's reasoning in this case.

Vautry against Aplen.

REPLEVIN. Defendant justifies as servant to J. S. as in his freehold. The plaintiff conveyeth by a lease for years, from the queen by her letters patents, but saith not *curiæ hic prolat.* and traverseth the freehold of J. S. Upon this the defendant demurreth generally, for want of these words, *curiæ hic prolat.* and doth not shew it for cause; and if it were matter of substance or of form, and so amendable by the 27. Eliz. was well debated.—PERIAM and WALMSLEY at first conceived that it was matter of substance; for by this manner of pleading, the defendant lost the advantage to demand *oyer* of the patents; for without saying "*hic in curiâ prolat.*" he cannot demand *oyer*; and if there be variance between them and the pleading, he may pray that they be entered in *hæc verba*, of which now he hath lost the advantage.—But afterwards *Paschæ*, 33. Eliz. it was held by all THE JUSTICES (except WALMSLEY), that it was but matter of form, and not much material; for it was but an inducement to the traverse, and so not traversable, and it may be amended. And they said, if the defendant maketh no defence, and that there wants an averment to the plea, these may be amended, and shall be inserted, for the truth of the matter appeareth; and in this case the letters patents are not issuable. But PERIAM said, if such plea had been in an avowry when it was issuable, it should be otherwise. And it was adjudged accordingly for the plaintiff.

CASE 16.

Where a deed is only inducement to the action, it need not be pleaded with a *proferet*. Ante, 153.

10. Co. 88. a. 98. b.
2. Bulst. 228.
Stile, 193. 264.
Jones, 377.
Cro. Jac. 43. 70. 673.
Cro. Car. 442.
1. Rd. Rep. 13. 328.
Palm. 387.
3. Mod. 52.
2. Mod. 277.
Hob. 301.
Ld. Ray. 762.
2. Salk. 497.

See 16. & 17. Car. 2. c. 8. Salk. 497. 6. Mod. 135. and 4. & 5. Ann. c. 16.

Richmond against Butcher.

CASE 17.

Hilary Term, 33. Eliz. Roll 315.

REPLEVIN. Upon demurrer the case was, John Colwell was seised in fee, and let the land for twenty-one years, rendering twenty shillings rent during the term, to him, his executors and assigns, and dieth. The defendant, as servant to his heir, for rent behind after the death of the lessor, distraineth; and after argument it was adjudged, that the heir shall not have the rent; for it being reserved to the lessor, his executors and assigns, and the heir being none of them, he cannot have it. 27. Hen. 8. pl. 15. 21. Hen. 7. pl. 25. 10. Edw. 4. 18. 11. Edw. 3. 86.—NOTA. They relied upon a book shewn to them in writing in 12. Edw. 2. where it was so adjudged (a).

Tenant in fee makes a lease for years rendering rent during the term to him, his executors and assigns, the heir shall not have the rent. Post. 832.

1. And. 361. 12. Co. 35. Roll. 613. 635. Jones, 309. Noy, 96. Cro. Jac. 290. Cro. Car. 289. Lat. 255. 264. 2. Saund. 370. Owen, 9. Co. Lit. 47. a. note [8]

2. Ro. Ab. 450. S. vid. Lat. 99. 5. Co. 111. 5. Com. Dig. 423.

(a) See the case of Sacheverel v. Frogart, 1. Vent. 161. 2. Saund. 367. Ray. 213. 2. Lev. 13. where this point is adjudged, and the existence of the case in 12. Edw. 2. denied. See 5. Co. 115 a.

. CASE 18.

Foster against Fountain.

A deed to lead the uses of a fine not good if delivered after the fine levied, unless the conveyance agreed to the uses.

EJECTIONE FIRMÆ.—It was held upon evidence by THE COURT, that if a fine be levied, and an indenture to lead the use of it be sealed and delivered afterwards, this is not sufficient to lead the use of the fine, except it be averred and proved that the conveyance intended before the fine levied, to levy it to this use.

Quære.

Dyer, 136. 9. Co. 10. 15. Moor, 192. 1. And. 125. 5. Com. Dig. 621.

See 29. Car. 2. c. 3. and 4. & 5. Ann. c. 16.

CASE 19.

Bind against Plain.

If a plaintiff who has obtained judgment in an inferior court, is, by any means, in possession of the defendant's goods, and redelivers them to him on a promise that his debt shall be paid, it is a good consideration in *assumpsit*, though the defendant had only a special interest in them, and the general property resided with a third person.—And neither the authority of the inferior court, nor where the goods were, nor the time, or place of request, need be alleged. Post. 884.

Cooper, 128. 1. Term Rep. 351.

THE plaintiff counts, that whereas he recovered against *Thomas Ward* in the queen's court in *Southwark*, held before the steward of the mayor of *London*, twelve pounds, and had a *fieri facias* to the bailiff there to make execution of the goods of the said *Thomas Ward*, which were in his hands; and whereas the bailiff was ready to do execution of the said goods, the defendant did assume to the plaintiff, in consideration that he 11th of *September* delivered to him the said goods, that he would within fourteen days after *Michaelmas* pay to him twenty marks, or otherwise deliver to him the said goods again, if in the mean time no other made title to them, and proved them to be his goods; and averred that none made title to them between the 11th of *September* and fourteen days after *Michaelmas*. The defendant pleads *non assumpsit*. The jury find the recovery and the *assumpsit*; but find further that the said *Thomas Ward*, long time before the recovery, had sold the goods to *R. W.* but with this proviso, that he shall have the possession of them for four years, which are not yet expired; and if he then pay such a sum of money, the sale should be void, and that *R. W.* made title to them by force of this sale. *Et si, &c.*

COOPER, *serjeant*, alledged, that the declaration was not good.—First, Because it was not shewn by what title the court of *Southwark* was held.—Secondly, That the bailiff was ready to make execution, but sheweth not where the goods were. But these exceptions were over-ruled not to be material, for they are but the inducement and conveyance to the action.—Thirdly, There was neither time nor place of request alledged, but only *scilicet requisitus*. *Sed non allocatur*; for it is to be paid at a day certain, and no request needful; otherwise, if request ought to have been made.—Fourthly, That upon the matter found judgment ought to be for the defendant; for it is found, the plaintiff had only a special property, and the vendee the general property, and so no cause of the re-delivery, and so no cause of the consideration; and it is found the vendee had title, so it is sufficiently proved a stranger had title.—But *Post. 33. Eliz.* THE COURT resolved for the plaintiff; for they held, that the plaintiff having possession of the goods *quomodocunque* he came to them, he is chargeable to *Thomas Ward* for them, although he hath but a special property, and he may maintain an action for them; so his delivery of the goods is a sufficient consideration; for by this the defendant had the benefit of the use of them, and the plaintiff hath loss, for he is chargeable to the action of *Thomas Ward*; and especially the consideration

deration is good, being only for the re-delivery of them, or payment of such a sum. And although he recited that he had these goods liable to the execution, which is not true; for *Thomas Ward* having only a special property, they are not liable to this debt; yet this is but a naked and void recital, and all the substance of the declaration is upon the delivery of them; and this being found, it was a good *assumpsit*.—It was adjudged for the plaintiff; and on error brought, the judgment was affirmed (a).

BIND
against
PLAIN.

(a) Post. 301.

Mulgrave against Ogden.

CASE 20.

ACTION SUR TROVER of twenty barrels of butter; and counts that he *tam negligenter custodivit* that they became of little value.—Upon this it was demurred, and held by all THE JUSTICES, that no action upon the case lieth in this case; for no law compelleth him that finds a thing to keep it safely; as if a man finds a garment, and suffers it to be moth-eaten; or if one find a horse, and giveth it no sustenance: but if a man find a thing and useth it, he is answerable, for it is conversion: so if he of purpose mis-useth it; as if one finds paper, and puts it into the water, &c but for negligent keeping no law punisheth him. *Et adjournatur*. Bull. N. P. 74. Salk. 655. Mod. Caf. 170. Strange, 60. 123. 576. 813. 1. Term 2, T. Rep. 755.

Trover will not lie for negligent keeping any thing; but if the thing be used or abused, it is a conversion.

1. Ro. Ab. 2, 3. 124.
Co. Lit. 89. a.
2. Bull. 21.
cont.
Rep. 12.

Jennings against Gower.

CASE 21.

DEBT as executrix. The case was, The testator of the plaintiff deviseth a term to *J. Watts*, and that "if *Agnes* his wife suffers the devisee to enjoy it three years, that she shall have all his goods as executrix; but if she doth disturb him, then he makes *G. J.* his son his executor;" and dieth. *Agnes* as executrix brings the action within three years.—ANDERSON at first conceived that the action could not be brought within the three years, for this is a condition precedent, so that until the performance of it she shall not be executrix: but the OTHER JUSTICES held she was executrix presently; for although in grants, estates shall not be till the condition precedent be performed, yet it is otherwise in a will, for a will shall be guided by the intent of the party; and this shall not be construed as a condition precedent, but as a condition to abridge her power to be executrix if she perform it not; for so (by PERIAM) the intent appeareth here by the words subsequent, viz. "if she disturb, that then *G. J.* to be executor," which doth prove that in the mean time he intended she should be executrix.—Afterwards in *Easter* term, 33. Eliz. it was adjudged for the plaintiff, that she was executrix until she disturbed, and that the plea of the defendant, viz. that she had made disturbance, was not good, without alledging in particular how she disturbed.

Devise of a lease to *A.* and if *B.* suffer him to enjoy it for 3 years, she shall be executrix; but if she disturb him, then *C.* shall be his executor.

This is not a condition precedent, and *B.* is immediately executrix.
Post. 914.

S. C. 1. Leon. 229.
Winch. 115.
1. Ro. Ab. 415.
3. Lev. 132.
8. Co. 91. a.
2. Ld. Ray. 765.
Dougl. 63. 685.
1. T. Rep. 645.

Smy against June & Alios.

CASE 22.

EJECTIONE FIRMÆ. The case upon special verdict was, Sir *Thomas Cotton* was seised of the land in question in fee, and conveyeth it to the use of himself for life, remainder to *Cheyne Cotton* his eldest son in tail, remainder to *William* his second son, "et primogenito filio prædicti *Willielmi* et hæredibus masculis dicti" primogeniti filii dicti *Will.* et pro defectu talis exitus, remanere inde hæredibus

The statement of the case vide *infra*.

2. Inst. 519.
1. Leon. 211.
Cro. Car. 200.

SMY
against
JUN & Alios.

"*heredibus masculis diu' Willielmi,*" and of Sir Thomas Cotton, with divers remainders over. *Checny Cotton* dieth without issue; and after *William* the second son had issue *W.* his eldest son, and goeth beyond sea. *Sir Thomas Cotton*, 29. *Eliz.* levieth a fine of this land, which was to the use of himself for life, and after to the use of *Robert Cotton* his third son in tail, with divers remainders over; and afterwards 21. *Eliz.* *William* the second son dieth beyond sea, *William* his son and heir being then and now within age. *Sir Thomas Cotton* dieth 27. *Eliz.* and 31. *Eliz.* *W.* enters, being within age, and lets it to the defendant, reserving no rent, but at will only. *Robert Cotton* enters and lets it to the plaintiff; upon which the defendants re-enter. *Et si, &c.*

It was argued by DREW and GLANVILLE, *serjeants*, for the defendants, and by BEAUMONT and HAMON for the plaintiff.

The use of a fine to *A.* and his eldest son, and the heirs male of the son does not make an estate tail.

FIRST MATTER. If *William* the second son had an estate tail by the limitation to him and his first son, and to the heirs males of the body of his first son, for he then had no son; so it is void to the first son, if it shall vest in *William* by the intent of the donor.

A remainder to the heirs male of *A.* and *B.* gives them several estates.
3. *Com. Dig.* 165.
219. 234. 359.

SECONDLY, Admit he hath not an estate tail by this limitation (as it was after agreed by all THE JUSTICES that he had not) if by the remainder after limited to the heirs males of the body of *William* and of *Sir Thomas Cotton*, they have joint or several estates tail: and as to that, it was clearly agreed that they have several estates tail and not joint; so that clearly the fine of *Sir Thomas* was good to bar *William* of one moiety, for he was tenant in tail of it.

The son of a person who dies beyond sea shall have five years after his death to avoid a fine.

THIRD MATTER. Upon the 4. *Hen. 7. c. 24. f. 4.* if the fine being levied *William* the son being beyond sea, if his heir shall have five years after his death; for the statute is, he shall have five years after his return; and in this case he never returns, and so is out of the words, and the proviso shall not be taken by equity.—But all THE JUSTICES to this resolved to the contrary, for the intent of the statute shall be observed; as the statute speaks, that an infant shall make his claim within five years after his age, yet if he claimeth within his age, it is good, yet it is out of the words.

Cruise on Fines, 232. to 241.

Tenant for life levies a fine, the reversioner shall have five years after his death to make claim.
Post. 254.

FOURTH MATTER. If tenant for life levy a fine, and he in the reversion or remainder doth not make his claim within five years after the fine levied, after the tenant for life dieth, if he shall have new five years after his death.—And all THE JUSTICES held he should, for this is as another title accrued to him; and it may be he had no conscience of the forfeiture; and if he had, it is at his election if he will take advantage of it; and so *Zame's Case* was cited to be adjudged, 7. *Eliz.*

9. *Co.* 105. b.
Cre. Jac. 157.

Plowd. 374. Shep. Touch. 31. Cruise, 215.

Lease by an infant is void.

FIFTH MATTER. That yet the plaintiff shall recover, for the title of the defendants was void; for they claim by lease at will of an infant where no rent was reserved, and so void.

Moor, 105.
1. *Mod.* 263.

Fitz. 301. 10. *Mod.* 421. 3. *Bac. Abr.* 304.

One tenant in common shall not have ejectment against the other without actual ouster.

CURIA. Although they have no title, yet it appeareth the plaintiff had no title to a moiety, and then he could not punish the defendants for his moiety in this action, where he must make title; otherwise perhaps in trespass: and for the other moiety, he shall not have an action without an express ouster, which is not found. Wherefore it was adjudged for the defendants. *V. Co.* 2.

Institutes 519.
Co. Lit. 199.
1. *Leon.* 272.

Salk. 391. Cowp. 217. 1. *Term Rep.* 759. in notis.

Sir Moyle Finch *against* Throckmorton.

CASE 23.

33. Eliz. In the Exchequer Chamber.

Hilary Term, 32. Eliz. Roll .

THE case upon demurrer was, that King *Philip* and queen *Mary*, 1. & 2. Ph. & Mary, demised the site of the priory of *Raveston* in the county of *Bucks* to *Th. Throckmorton* for seventy years, rendering rent at the feasts of the *Annunciation* and *St. Michael*, with a proviso, that upon non-payment within forty days after the feasts, the lease should cease and be void. 9. Eliz. the rent was not paid at *Michaelmas*, nor within forty days after; but afterward the queen's receiver received it, and maketh an acquittance as if it had been paid at the day, and receiveth the rent afterwards every year till 30. Eliz. and makes acquittances of it. 40. Eliz. the queen grants this land in fee to *Sir Thomas Henneage*, and afterward an office was found, which found the non-payment 9. Eliz. upon which *Sir Thomas Henneage* entered, and let it to the plaintiff.

Where a lease is ipso facto void by the condition, no acceptance of rent afterwards can make it to have continuance; and the reversion being in the crown, the king's patentee may enter without office found. Ante, 3. 167. Post. 855.

FIRST QUESTION was, If the lease was void or not without office?—SECOND, If the acquittance could make it good?—THIRD, Admit there must be an office, if after the patent it cometh time enough for the patentee to avoid it?—And this was divers times argued at the bar, and afterwards by the *Barons*.

1. And. 303.
Pop. 25. 53.
Moor, 291.
1. Roll. Abr. 475.
2. Roll. Abr. 184. 215.
2. Leon. 134.
Co. Lit. 215.
Cro. Car. 100.
173.
Cro. Jac. 344.
3. Co. 64. b.
10. Co. 114. b.
5. Co. 52. a.
Plowd. 131.
Cowp. 482.
Dougl. 57.
2. Term Rep. 425.
2. Co. 344.

And all THE BARONS agreed for the plaintiff; and that this lease was void immediately upon the non-payment; for the words are, that upon non-payment the lease shall cease and be void, so that the land is discharged of this contract of the term, and the patentee is no longer a termor, nor (as MANWOOD said) a tenant at will, nor at sufferance, but only as a bailiff or pernor of the profits *de son tort*, and then all the acceptance after cannot make a void lease good; and the office is only necessary to inform the queen when the condition was broken, to intitle her to all the mean profits, and to reduce the possession, if the estate had continued out of the queen: but as this case is only to intitle her to the mean profits, and being found only for this purpose, it is well enough for the time, notwithstanding the patent of the inheritance; for they held, that the first estate ended as by limitation, and in such case no office is needful to intitle the queen: also it ends by the limitation in the first letters patents, which are a record; so the record which doth create it doth destroy it, and the patentee might enter as in land of which there was no lease. And it was adjudged for the plaintiff.—NOTA. A writ of error was brought in the exchequer-chamber, and error assigned in the matter of law; and after argument, *Mich. 36. & 37. Eliz.* the judgment was affirmed.

Termine

Easter Term,

33. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*Sir Francis Gawdy, *Knt.*John Clench, *Esq.*Edward Fenner, *Esq.*} *Justices.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Fermor against Dorrington.

"I will prove
"him to be a
"perjured
knave," are
actionable.
Post. 730.
Cro. Jac. 214.

ACTION for words, which were, "I will prove *Fermor* to be a perjured knave." After verdict it was alledged in arrest of judgment, that the words are not actionable, for he doth not say he was perjured, but that he would prove him perjured; for it may be, that if he doth any act after that he may be convinced of it.—But all THE COURT held, that the action lay, and the words cannot have such construction.

Judgment
stayed for a di-
versity in the
christian name
of a juror be-
tween the *venire*
and *distringas*.
Ante. 57.
Post. 256. 258.

5. Co. 42.
Cro. Car. 203.
Cro. Jac. 116.
558.
Hob. 64.
3. Bac. Abr.
276.
Cowp. 435.

ANOTHER matter was alledged, that in the *venire facias* and *distringas*, one *Taverner* was named one of the jurors; but in the return of the *distringas* in lieu of *Taverner* one *Turnor* was returned, and was sworn, and tried the matter; so it is a mis-trial, being tried by one that was not returned in the *venire facias*. And COKE cited a precedent in this court between *Dousby* and *Willot*, where a juror was returned by the name of *Gregory Willot*, and in the *distringas* he was named *George Willot*, and he with others passed upon the inquest; and for this cause the judgment was stayed. And another precedent in the exchequer, where one *Mizael* was returned upon the *venire facias*, and upon the *distringas* one *Michael*, and both these were returned for surnames; and because *Michael* was sworn, &c. the judgment was stayed.—And so it seemed to THE COURT; but they at first doubted if the variance in the surname be a cause to stay judgment; but for variance in the christian name, they agreed clearly the judgment shall be stayed, but one may have two surnames. But afterwards it was resolved the judgment should be stayed.

CASE 2.

Taylor against Beal.

Quere, If a les-
see is authorised
to expend part
of the rent for
the repairs of
the premises?
1. Leon. 237.
320.
1. Ld. Ray. 420.
Doug. 748.
1. Term Rep.
454-457.
2. T. Rep. 630.

DEBT for rent reserved upon a lease for years. The issue being joined if the rent were paid or not, the defendant gave in evidence for part of the rent, that the plaintiff by covenant was to repair the house and did not, and that thereupon he expended part of the rent in repairing the house. The question was, If this evidence will maintain the issue?—GAWDY conceived it did, for the law giveth this liberty to the lessee to expend the rent in reparations, for he shall be otherwise at great mischief, for the house may fall upon his head before it be repaired; and therefore the law alloweth him to repair it, and recoupe the rent. *Vide* 12. Hen. 8. pl. 1. 12. Rich.

12. *Rich.* 2. *Barr.* 242. 14. *Hen.* 4. *pl.* 27.—FENNER. It is no evidence; for if the lessor will not repair it, he is to have his covenants against him.—CLENCH seemed he might well expend the rent in reparations, but he ought to have pleaded it, and cannot give it in evidence upon the general issue; and they thereupon moved the jury to find the special matter. And as to the residue of the rent, he shewed that he paid it to others that had rent-charges out of the lands, which the lessor had covenanted to pay, and that by the commandment of the lessor he paid the rent, in discharge of the said rents: and this was clearly held good; for payment to another by the plaintiff's appointment, is payment to himself.

TAYLOR
against
BEAL.

Trusloe against Yewre.

CASE 3.

IT was agreed upon evidence, that where a controversy was between two persons for a lease of land, who submitted themselves to the arbitrement of J. S. for it, and J. S. did award that one of them shall have the land, this is a good gift of the interest of the term. 12. *Affise*, 25. But if the award were, that he shall permit and suffer the other to enjoy the term, this giveth not the interest in it.

The interest of an estate for years transferred by an award. *Post.* 348.

Wood Inst. 525.
1. *Roll. Abr.* 242.
Dyer, 183.

3. *Bac. Abr.* 421. 2. *Leon.* 104.

ALSO it was held, that if a term be devised to an executor, the remainder over, and the executor enters generally, this shall be taken as a devise, for it is more for his benefit.—They moved the jury to find these matters specially, but they would not, but gave a general verdict.

Election.

10. *Co.* 47. b.

Plowd. 520.

2. *Co.* 37.

2. *Bac. Abr.*

187. 435.

Gore against Parkhurst.

CASE 4.

EJECTIONE FIRMÆ. Bail was put in for the defendant by the name of *Parkes*, but the declaration and all the proceeding was by the name of *Parkhurst*; and this matter after verdict was alledged in arrest of judgment.—And *Trin.* 33. it was adjudged, that for this cause, *plaintiff nihil cap. per billam*; for it doth not appear that the defendant against whom the judgment was given, was *in custodia marescalli*, and otherwise the proceeding against him is *coram non iudice*, 31. *Hen.* 6. *pl.* 10. and it cannot be intended the same person, neither can it be amended. And THE COURT said, if there be a bail, and the bail piece is pulled off the file, the party without remedy.

If the bail-piece is in a different name from that in the other proceedings, or be taken off the file, judgment shall be reversed.

Post. 894.

Hob. 164.

Moor. 694.

Cro. Jac. 698.

Strange, 921.

Anonymous.

CASE 5.

IN an appeal of murder, the defendant was acquitted, and the abettors and damages were enquired and assessed to sixpence.—GODFREY moved that the damages might be increased by the Court, as they may by the statute *West.* 2. c. 12.—And THE COURT said, they shall be increased.

Damages increased on acquittal in appeal.

22. *Aff.* 19.

2. *Inst.* 387.

2. *Hawk.* 289.

Withington against Dalaber.

CASE 6.

IN appeal of murder by a *feme*, the defendant pleaded *nient accoupl' in loyal matrimony*; *et si trove que soit*, not guilty to the felony. The plaintiff replies, that she was *accoupled in loyal matrimony*, when it is accompanied by a special plea triable by the common law.—*Post.* 495. 2. *Hawkins' Pleas Crown*, 283.

The general issue in felony must be traversed by the replication. 3. *Leon.* 268.

WITHERINGTON
against
DALABER.

mony, and doth not answer or plead that he was guilty of the felony. And it was moved, that this was a discontinuance.—CURIA. When a plea is pleaded which is triable at common law, and concludes over to the felony, there the plaintiff ought to reply and conclude over to the felony; but when he pleads a plea triable otherwise than by the common law, it is otherwise.

CASE 7.

Dethick's Case.

A cathedral is
within the 5.
Edw. 6. c. 4.—

HE was indicted upon the 5. Edw. 6. c. 4. for striking in Saint Paul's church-yard: and it was moved, that it being in the church-yard of a cathedral church, it is not within the statute.—CURIA contra.

Garter king at
arms is a name
of dignity, and
the possessor
must be sued by
it.—*Quære*, If in
matters not con-
cerning his office?
he was discharged of the indictment.

Then he pleaded, that he was by the queen's patent created GARTER king of arms, and demands judgment, because he is not so named.—And because it was a name parcel of his dignity, and not of his office only; for the patent is, *creamus coronamus et nomen imponimus de GARTER rex heraldorum*, and therefore in all suits against him he is to be named by this name; for this cause

Vide post. 542.

S. C. 1. Leon. 248. Carth. 440. Strange, 850. Bar. K. B. 209. Fitzg. 175. 275. 3. Bac. Abr. 57.

CASE 8.

Lady Ratcliff against Shubley.

Trinity Term, 31. Eliz. Roll 415.

It is sufficient if
words of defa-
mation be sub-
stantially proved.

Cro. Jac. 408.

Hob. 228.

2. Bl. Rep. 791.

ACTION for words, "She is as very a thief as any that robbeth by the highway-side." Upon not guilty pleaded, the jury found that he spake these words, "She is a worse thief than any that robbeth by the highway-side." The question was, If upon these words found by the verdict she should have judgment?—THE COURT held clearly, that the words in both cases are actionable: but GAWDY and FENNER held, that the words found do not agree with the declaration; for the jury do not find that the defendant at the time mentioned in the declaration spoke the words in the verdict; so it may be he spoke them at several times; and differs from *Bridge's Case*, *Dyer*, 75. where the jury found he spake part of the words but not all; for there they did acquit him of the residue, and the words are of one sense.—WRAY contra. "As very a thief," and "a worse thief," are all one.

CASE 9.

Cole against Wall and Burnell.

The lessee of a
copyholder may
maintain a
ejectment at
common law.
Post. 535. 717.

4. Co. 26. a.
Moor, 128. 272.

539. 569.

Lit. 234.

2. Com. Dig.

530.

1. Bac. Abr.

490.

Gilb. Ten. 213.

EJECTIONE CUSTODIÆ of a ward and his land. And declareth, that the lord of the manor of S. had the custody of the heir of his copyholder, and of his land, by the custom there, until the heir came to his age of fourteen years, and that he might commit the custody of his body and land to whom he pleased; and that one Cl. died seised of his land, being a copyholder of inheritance, and that the lord granted to him the custody of the heir, being within the age of fourteen years, and the defendant ejected him. After verdict, it was alledged that an *ejectione firmæ* doth not lie of a copyhold estate.—And so it was ruled by the WHOLE COURT; and the judgment was stayed. And THE JUSTICES said, that an *ejectione firmæ* doth lie of a lease made by a copyholder, but not for

1. Term Rep. 600. 2. Term Rep. 193.

a demise made by the lord of a copyhold, by copy of court roll. —But afterwards, *Trin. 33. Eliz.* this case was moved again; and alledged, that this action is an action upon the case, in nature of an *ejectione custodiæ*; and not upon a grant by copy, but upon a grant at common law: and thereupon it was adjudged that the action lay.

COLE
against
WALL
and
BURNELL.

Guildeslew against Ward.

CASE 9.

ACTION for these words: "Thou hast stolen a load of hop-poles."—And it was ruled, that they were actionable; for it shall not be intended but they were cut down before; for otherwise they could not be said hop-poles, or that he could otherwise steal them.

Words
actionable.

Marsh and his Wife.

CASE 10.

MARSH and his wife, as executrix to *Wilkenfon*, brought a writ of error to reverse an outlawry of felony against the testator. The error assigned was, That the *exigent* issued to *London*, and the sheriff returned *quod exigi fecer' de comitatu in comitatum*, whereas it ought to be *de hustingo in hustingum*, for they have no counties; and for this cause it was held a manifest error. But the principal question was, If error lieth by an executor to reverse an attainder of felony in the testator?—**COKE**, and **POPHAM** *Attorney General*, alledged, that it cannot be maintained by an executor. First, Because a person attainted cannot have executor. Secondly, Executor cannot have error, but to reverse a judgment in the personalty. But here the judgment is more high, for it is in the realty; and it may be mischievous, for the executor may pursue faintly; and so the judgment may be affirmed, and bind the heir. Thirdly, Upon a writ of error to reverse an attainder in felony, a *scire facias* ought to be to warn the lords mediate and immediate, which cannot be at the suit of an executor.—**GAWDY** conceived the action did well lie: for executors are privy to the judgment, and peradventure have all the loss; for it may be that he that is outlawed had only goods, and no land. And as to the disability alledged, that the testator was attainted, and so had no goods, nor can make an executor; it is not material in this suit, where they are to reverse the attainder which doth disable them, as 11. *Hen. 4. pl. 64.* But it doth not appear by that book, that he was outlawed for felony. And as to the faint pursuing of the action, the heir and executor, by reason of their several interests, may have several writs of error, as the tenant and vouchee may. And as to the *scire facias*, this needs not be in respect of the goods which are intended to be in the queen's hands, who is always present in court; and it is to be well considered, if it may be against the lords. But the clerks said, a *scire facias* had been awarded against the lords.—**WRAY**. The disability alledged is not to be objected against the executor, the suit being to reverse it. And the case is to be well considered, for it may be very mischievous against the lord. *Et adjournatur.*

An executor may bring a writ of error to reverse the outlawry for felony of his testator.
Post. 273. 558.
1. Roll. Abr. 912.
5. Co. 111. a.
1. Mod. 224.
Owen, 147.
1. Leon. 325.
3. Dan. Ab. 14.
Godb. 376.
Salk. 60. 295.
2. Hawk. 654.

See the continuation of this case, post. 273.

CASE 11.

Garnons against Sir Henry Weston.

Trinity Term, 32. Eliz. Roll 877.

A fine pleaded of two manors *inter alia* is erroneous.—In an assise for a rent-charge against the feoffee of a tenant in tail, it is not necessary to aver the life of the tenant in tail. Ante, 87. 112. Post. 407.

Plowd. 264. 431.
Lut. 357. 1172.
1. Leon. 177.
281.
9. Co. 60. b.

ERROR upon a judgment given in an assise of a rent-charge of fifty pounds *per annum*; in which the title was, *John Vaughan* and *Anne* his wife (mother of the plaintiff in the assise) were seised of the manors of *Huntington-English* and *Huntington-Welsh*; and by fine, 18. *Eliz.* conveyed the manors *inter alia* to one *Whitney*, *per nomen* of two manors and of fifty messuages, and three hundred acres of land, &c. who by the same fine rendered the said rent of fifty pounds to them, and the heirs of *Anne*; and rendered the manors and tenements aforesaid to them for their lives, remainder to *Francis* their son in tail, remainder to the heirs of *Anne*; and that *John Vaughan* and *Anne* died, and that the rent descended to the plaintiff as son and heir of *Anne*; and that *Francis* entered as in his remainder, and thereof enfeoffed the said *Garnons*, who was tenant in the assise; and upon *nul tort*, *nul disseisin* pleaded; and found for the plaintiff, he had judgment to recover.

Upon this error was brought.—First Error. That this fine is pleaded of these manors *inter alia*, so it may be intended that other lands passed in the fine: so an assise brought against him that was only tenant of the manors, is not good; for all the tenants of the land charged are to be named.—Second, Because the life of *Francis*, who was tenant in tail, was not averred.—Third, That the fine by the grant of the rent, and of the land to the same person, by the fine, is repugnant for the rent, and so void: for she cannot take the land and rent at the same time.—Fourth, When she had the remainder in fee of the land charged, the rent by this is extinct.—*STEVENS* for the plaintiff, and *BOURCHIER* for the defendant.

To the first, *GAWDY* and *CLENCH* held it to be error; for it being *inter alia*, the *per nomen* shall be intended of more than the two manors; and the terre-tenants of the residue not being named, it is not good.—*FENNER contra*.

To the second error, they all held the life of *Francis* needed not to be averred, for he had made a feoffment, and so the estate did continue.

A render of rent may be transposed by construction to make it effectual.

Co. Lit. 312. b.
1. Leon. 255.
Plowd. 14.
1. Salk. 117.
2. Com. Dig.
350.

To the third error, it seemed to them, that the rent granted by the same fine that the land was granted, was good; for the law shall marshal them, and the grant of both shall be good.—For first, The rent shall pass, and then it shall be as a purchase of the land by *Anne*, who was seised in fee of the rent; and the purchase of the remainder in fee shall not extinguish the rent, but it shall be in effect during the particular estate; for by this the possession is only charged. And therefore *GAWDY* said, the difference is where one hath a rent service, and he purchaseth the remainder or reversion in fee, all the whole seigniory is extinct: for the entire tenancy is held, but the purchase of the reversion or remainder in fee doth not extinguish a rent charge; for it is chargeable upon the possession, for he shall avow as in land chargeable to his distress. *Et adjournatur*.

NOTA. It was discontinued by the death of Sir Henry Weston.

Page

Page against Faucet.

CASE 12.

Easter Term, 29. Eliz. Roll 121.

ERROR of a judgment given in *Lynne*.—The error assigned was, That the judgment was given at a court held there 16. *February*, 26. *Eliz.* and this day was *Sunday* (a), and it was so found by the examination of the almanacks of that year.—And it was ruled, that this examination was sufficient, and a trial *per pais* was not necessary, although it were an error in *fact*. And the judgment was reversed.

The almanack is good evidence to prove the day of the week by the day of the year; and a judgment recorded on a *Sunday* is void.

Ante, 210. 1. Sid. 300. (a) Britton. 134. Co. Lit. 135. a. 2. Inst. 264. Plowd. 265. 2. Salk. 626. Cro. Car. 602. W. Jones, 156. 5. Burrow, Swan v. Broom, 1596. Fost. 373. 5. Com. Dig. 323. 6. Mod. 41. Id. Ray. 4. 281. 870. 1544. 1556. 2. Bl. Rep. 1006.

(a) See 29. Car. 2. c. 7.

Ward against Knight.

CASE 13.

Trinity Term, 30. Eliz. Roll 646.

ACTION ON THE CASE. And declares, that whereas *Lofstocke* is an ancient village, and ancient demesne of the crown of *England*, and that the tenants and men of ancient demesne are to be quit of toll in all places, &c. and that he was an inhabitant and tenant there, and had brought his goods to *Yarmouth*; the defendant, not being ignorant thereof, had taken one cable of his goods for toll, &c. The defendant justified, for that *Yarmouth* is an ancient borough incorporate of bailiffs and burgesses, and had used from the time, &c. to have a water-bailiff there, and had used from the time, &c. to have toll of the tenants and inhabitants of *Lofstocke*, for any of their goods brought there by sea for merchandise, and if it be not paid to distrain, &c. and the plaintiff, being an inhabitant of *Lofstocke*, brought by sea twenty hundred weight of cable ropes to *Yarmouth* for merchandise; for which he demanded toll, and because it was not paid, took this cable rope *nomine districtionis*, &c. And upon this it was demurred; and it was argued by *GOLDING* for the plaintiff, and by *HOBART* for the defendant; and in the same term it was adjudged for the defendant.—THE COURT gave no public reason of it, but privately did agree between themselves for the substance of the matter; for *WRAY* said, it is not reason they should be discharged for merchandise; and so are the books. *Vide* 9. Hen. 8. pl. 25. 19. Hen. 6. pl. 66. 7. Hen. 4. pl. 43. Fitz. N. B. 228. a. contra.

A tenant in ancient demesne shall not be privileged from paying toll where he trades as a common merchant.

1. Roll. Abr. 311.
Lut. 1146.
F.N.B. 14. 228.
2. Inst. 221.
1. Leon. 231.
2. Leon. 191.
1. Bac. Abr. 111.
2. Bac. Abr. 459.
Doug. 190.

Lovelace against Grimden.

CASE 14.

Michaelmas Term, 32. & 33. Eliz. Roll 94.

ERROR of a judgment in the common pleas.—The error assigned was, That in trespass for taking of five horses, the defendant justifieth, for that one *Guillam* was amerced for blood-shed within his leet; and that he, and all those which were lords of the manor, from the time, &c. had used to distrain the beasts of any which came within the manor, and were in the possession of any man that was amerced in the leet for the amercement; and said, that these five horses were in the possession of *Guillam*; for which he did distrain them, &c. The plaintiff took issue, that they were not in the possession of *Guillam*. And upon this issue being joined, it was found for the plaintiff; and judgment given for him.—And it was assigned for error, that the issue was joined upon a thing merely void;

2. If the joining issue upon a void prescription is aided after verdict?

Ante, 214.
2. Roll. Abr. 99.
Salk. 173. 216.
Id. Ray. 60. 385.
1. Com. Dig. 335.
1. Stra. 397.
Doug. 685.
1. Ter. Rep. 151.
2. Ter. Rep. 758.

LOVELACE
against
GRIMSDEN.

Post. 259. 455.

void; and so no issue, and not aided by the statute of *jeofails*.—And THE COURT agreed, that if there be no matter of bar in the plea, and the issue joined upon it, this is void, and not helped by the statute of *jeofails*. But if the plea containeth matter of bar, and issue is joined upon a thing not material, this is aided by the 32. Hen. 8. c. 30. But here is no matter of bar; for the prescription is agreed to be void; and then if no bar, no issue; and so can be no mis-joining of issues, when there is no issue joined. And although the bar was ill, so that the plaintiff might have had judgment upon the bar; yet judgment being given upon the verdict, where no issue was joined, is erroneous.—And they all agreed, that the judgment should be reversed: but they would advise till the next term.

CASE 15.

Green against Penilden.

If the spiritual court refuse a plea good at common law, a prohibition shall go.

3. Leon. 265.

Cowp. 424. Dougl. 378. 1. Term Rep. 552.

PROHIBITION for suing for tithes, was prayed, for that he had pleaded in the spiritual court, that the said *Penilden* was not lawful intumbent, but one *Taylor*; which plea they would not allow the parishioner to plead to the right of the incumbency.—And it was granted *PER CURIAM*; for he being the tenant of the land, may plead it, or else he shall be twice charged for his tithes.

CASE 16.

Man's Case.

If the spiritual court impeach a marriage without the Levitical degrees, a prohibition lies.

Hob. 181.

Vaugh. 207. & 304.

Vent. 10. 15. 21. Eq. Caf. 156. (a) Moor, 907. 4. Leon. 16. Vaugh. 248. 3. Lev. 364. 5. Mod. 168. 448. 1. Sid. 434. 2. Lev. 254. 2. Jones, 118. Ray. 464. Lut. 1077. 2. Inst. 683. Noy, 29. Comb. 356.

HE had married his wife's sister's daughter (a); for which he was sued before the High Commissioners. For although this was not prohibited within the Levitical degrees, yet because degrees more remote are forbidden, they gave sentence of divorce. And he grounded his prohibition upon the 32. Hen. 8. c. 38.—And a consultation was prayed and granted, because the prohibition is not to be, if it be not within the Levitical degrees: and here it was general, and therefore not good. *Vide Co. Litt. 235.*

CASE 17.

Stranham against Cullington.

If the spiritual court attempt to try the boundaries of parishes, a prohibition lies.

Ante, 178.

2. Roll. Abr.

291. 7. Co. 44. 3. Leon. 129. Cowp. 424.

PROHIBITION for suing for tithes, as proprietor of the rectory of *Cednam*. And shewed, that the tithes did grow *inter loca decimabilia* of that parish, as he ought to do, and that must be first proved. The defendant there pleaded, that the land was in the parish of *Ashpole*, and that he had paid the tithes there; and upon this they are at trial, and upon this he had a prohibition; for the bounds of the parish are triable by the common law.

Hear-say is sufficient proof of a suggestion in prohibition, but *opinion* is not.

Moor, 911.

Palm. 377.

Noy, 28.

Kelly, 100.

4. Bac. Abr. 246.

Dougl. 530.

AND upon another prohibition for tithes, unity of possession in the time of the abbot, at the time of the Dissolution, was surmised; and proved it by the testimony of *Mr. Hynde* and another, who said, they had seen a deed of appropriation of the parsonage to the abbot; for which they verily thought, that there was an unity of possession at the time of the Dissolution.—And this was ruled no proof, for it may be intended not to continue; and a consultation was granted: but they said, that *hear-say* shall be allowed for a proof.

Appethwart

Applethwart *against* Nortly.

CASE 18.

Michaelmas Term, 32. & 33. Eliz. Roll 472.

ASSUMPSIT. That in consideration he promised the defendant to marry his daughter, he promised to give the plaintiff forty pounds: *et dicit in facto*, that he had married his daughter. Upon *non assumpsit*, it was found for the plaintiff: and it was alledged in arrest of judgment, that no time or place was alledged of the request.—*Sed non allocatur*; for it is in nature of a debt; and it is not here appointed to be upon request, but otherwise it is of a thing collateral.

A promise in consideration of marriage is good; and it is not necessary to state in the declaration the time and place of the request.

Ante, 74. 5. Com. Dig. 52.

Hopkins *against* Stapers.

CASE 19.

ASSUMPSIT. For that in consideration he had sold and delivered one thousand couples of *Newland* fish *ad usum proprium* of the defendant; and in consideration he had shipped the said fish, and agreed to transport them from *Bristol* to *St. Lucar* in *Spain*, and to re-transport from thence the value of the fish to *London* or *Bristol*, *secundum usum mercatorum*, the defendant promised to pay to him 120*l.* upon the arriving of them *in portu St. Lucar*: and alledges *in facto*, that he arrived with them *ad portum St. Lucar*; and had re-asported from thence goods, to the value of the fish at *London*, *secundum usum mercatorum*. Upon *non assumpsit* pleaded, and found for the plaintiff,

A promise to pay on arrival *IN* such a port, in consideration of the plaintiff having sold goods to the use of the defendant, and having agreed to transport them, is good, though the arrival is alledged *AD* the port, and tho' it is not stated to whom the goods were sold, or with whom he agreed to transport them.

2. Ld. Ray. 1367.

EGERTON moved in arrest of judgment.—First, That it is no consideration; for he saith he had sold and delivered the fish to the use of the defendant, but sheweth not to whom; by which it might appear the property was altered by the sale.—Secondly, He said in consideration he agreed to transport, but saith not with whom; and it may be he agreed with a stranger, which doth not bind the defendant.—Thirdly, The promise is, he shall be paid when he arriveth *in portu St. Lucar*, and he shewed he arrived *ad portum*; which is no performance of the consideration; and there is a difference between *AD* and *IN*, in conditions and considerations, though not in charges; and he relied upon 16. *Hen. 7. pl. 9.* 3. *Hen. 4. pl. 9.*—Fourthly, He shewed that he brought goods of that value to *London*, but sheweth not to whom the property of the goods did belong; so they might be the goods of a stranger.

CURIA contra in omnibus. For to the first and fourth, they said, it shall be intended that the goods were sold and delivered to the defendant, and that he re-asported the goods of the defendant; for it is *secundum usum mercatorum*, which implieth both. To the second, it shall be intended that he agreed with the defendant himself; and if it were with a stranger to his use, it is all one. To the third, *AD* and *IN* are of the same effect, and shall not be intended otherwise.—And it was adjudged for the plaintiff.

CASE 20.

Mead against Bygott.

Assumpsit will not lie for the value of corn out of sacks delivered under an attachment.
Ante, 178.
Post, 654.

1. Ro. Ab. 16. 26.
Moor. 468.
2. Lev. 17.
Cro. Jac. 103.
30. 652.
3. Leon. 236.
2. Will. 133.
2. Burr. 924.

ASSUMPSIT. That whereas *J. Arnold* levied a plaint in the court of *Stepney* against *Stokes*, and a precept to attach the goods of *Stokes* was directed to the plaintiff, being bailiff there; and whereas he attached *Stokes* by two quarters of corn, and delivered them to the said *Arnold* to deliver them at the next court; the defendant assumed to save him harmless of the said corn. Upon *non assumpsit* pleaded, and found for the plaintiff, it was moved in arrest of judgment, that the consideration and promise was against law, and so void.—And so was the opinion of THE COURT. For, FIRST, Attachment cannot be of corn out of sacks (a).—SECONDLY, If it may, it is to be kept by the bailiff, and he ought not to deliver them out of his hand to the party plaintiff; and so the promise is against law, and void.

(a) See 9. & 10. Will. 3. c. 44. f. 74.

CASE 21.

Sir Richard Buckley against Wood.

Michaelmas Term, 31. & 32. Eliz. Roll 381.

To charge another with felony or piracy by bill in the star-chamber is actionable, for that court not having jurisdiction in either of the offences, the exhibiting such a bill was not a proceeding in the course of justice.
Ante, 193.
Post, 747.

3. C. 4. Co. 14.
3. Leon. 138.
1. Saund. 132.
1. Roll. Ab.
43 87.
4. Bac. Abr.
479. 518.
1. Term Rep.
B. R. 111.
2. Term Rep.
499.

ACTION FOR WORDS. And declared, that whereas the defendant did exhibit a bill against him in the star-chamber, 30. Eliz. containing, *inter alia*, "that he was a noseler of thieves, murderers, and pirates, &c." and recited a great part of the bill; that afterwards the defendant, at *Pausbery* in *Salop*, 7. May, 31. Eliz. said, "he would justify his bill to be true in every part, &c." The defendant pleads, that the said seventh of May at *Westminster*, in the county of *Middlesex*, he was demanded by the lord chancellor, If his bill were true? and he said it was true in all points, *ABSQUE HOC quid dixit prædicta verba*, before or after the said day, *aliter vel alio modo*. And upon this the plaintiff did demur.—And Mich. 32. & 33. Eliz. *TANFIELD* argued, that the matter in the declaration is not sufficient to maintain the action; for it is for exhibiting the bill, and saying it was true in all points.

—As to the first, For exhibiting a bill in course of justice, no action lieth; and if it be false, he shall be punished by costs given in the star-chamber, and not by action. And although the matters are not punishable there as felonies, yet they are punishable there as misdemeanours in him, who was a justice of peace, and a deputy-lieutenant of the county, and may be punished for abusing his office, 11. Eliz. *Dyer*, 285. *à scandalis magnatum*, for an action for forging a false deed brought against the Lord B. held not maintainable. And Mich. 27. & 28. Eliz. in this court, between *Tutbill* and *Osborne*, for exhibiting divers articles to the justices of peace at the quarter sessions, to have the good behaviour; although they were false, yet not actionable, for it is in a course of justice. So Mich. 8. & 9. Eliz. between *Stanley* and *Curson*, one was brought in by *subpæna ad testificandum*, and upon his oath declared matter of infamy against the plaintiff; yet he coming in by course of justice, and if he swear falsely, he may be punished for perjury, it was adjudged an action did not lie. And for the other words in justification of his bill, no action lieth: for it is not said, he shewed the contents of his bill, and so can be no slander; and for saying he had a bill depending against one, is no slander.—*COKE contra*. He agreed that if

if his bill of complaint was in course of justice, no action did lie; but here he complains of divers matters which did not concern himself, but others, with which he had nothing to do; and it was the *Lord Clinton's Case*, 19. *Eliz.* and this is no star-chamber matter, which toucheth his life.—And one *Leonard's Case* was dismissed for the like cause, where one exhibited an *English* bill in the said court, containing divers slanderous matters, an action upon the case did lie; and *Pasch.* 23. *Eliz.* in this court, between *Bowes and Stanley*, which was entered *Trinity Term*, 21. *Eliz.* Roll 559. this very cause was adjudged, where one exhibited a bill in star-chamber, and after came into the country, and spoke of the matters of his bill at *Stafford*, and affirmed them to be true: and adjudged an action lay; for he shewed not his counsel, but publicly; and our declaration was framed upon that precedent.—*Et adjournatur. Vide post. page 247. Case 7.*

BUCKETT
against
WOOD.

Chambers and Johns.

CASE 22.

THEY were indicted for inroaching upon the high-way, *et unum tenementum ibidem ereclaverunt*; whereas it should be *erexerunt*; for there is no such *Latin* word as *ereclaverunt*; and it is not *ANGLICE* did erect, which had been good.—And for this cause it was discharged.

Indictment
quashed for
false Latin.
Ante, 137.

4. Co. 121.
Keil. 100.

1. Sid. 318. Cro. Jac. 129. 2. Hawk. 340.

Penhallo's Case.

CASE 23.

HE was indicted upon the 5. *Edw.* 6. c. 4. for drawing his dagger in the church of *B.* against *J. S.* and doth not say (according to the statute) to the intent to strike him; and for this cause it was void.—But then it was moved, if this were not good as for an assault, that he might be fined upon it.—But *PER CURIAM*, it is void in all: for being indicted upon the statute, it is void as to an offence at the common law.

Indictment on a
statute must
conclude *contra
firmam statuti*;
and cannot be
made good for
an offence at
common law.
Post. 307. 319.

494. 697. 1. Salk. 212. 2. Hale, 171. Cas. Temp. Hard. 193. 4. Leon. 49. Noy, 171. Sed vide
2. Hawk. 336. contra. Cowp. 648. Dougl. 441.

Wing against Harris.

CASE 24.

EJECTIONE FIRMÆ. Upon a special verdict, *Henry* the eighth was seised of certain lands called *Burnels*, and of the site of the hospital of *St. Johns* in *Wells*. He demised *Burnels* to *Aylsworth* for twenty-one years, and afterwards granted the reversion of it (*inter alia*) to the bishop of *Wells* in fee; and afterwards the bishop granted those lands *inter alia* to *Edward* the sixth, which did descend from him to queen *Mary*; and afterwards queen *Mary* demised the lands to the said *Aylsworth* for sixty years, not reciting the first lease made to *Aylsworth*.—This case was argued *Mich.* 32. & 33. *Eliz.* and *Pasch.* 33. *Eliz.* adjudged, that the lease for sixty years was void, for non-recital of the lease for twenty-one years: for although by the taking of the second lease the first was drowned, yet at the instant time of the taking of the second lease it was *in esse*; and therefore ought to have been recited, especially being a lease upon record. But of a lease by matter in fact, they agreed there need be no recital: the objection against it was, because the reversion had been conveyed to the bishop: so in his time the lease might have determined without

A grant for life
from the crown
to a lessee for
years of the
same estate,
must recite the
lease for years,
or the grant is
void.

2. Ro. Ab. 290.
Moor, 415.
3. Leon. 242.
Cro. Car. 198.

WINE
against
HARRIS.

any matter of record: and for this cause, when it came to the queen's hand, it need not be recited.—But THE COURT held, forasmuch as *Aylsworth* was the person that was the lessee, and might well have knowledge of it, if it had been so done, and no such thing is done, when the reversion was in the queen's hands, it is as if it had never been granted from the crown: and for this cause it was adjudged accordingly.—There were other points in the case, but it was resolved only upon this.

Easter Term,

33. Eliz. In the Common Pleas.

Sir Edmund Anderson, *Knt.* Chief Justice.

Sir William Periam, *Knt.*

Hugh Wyndham, *Esq.*

} Justices.

Sir John Popham, *Knt.* Attorney General.

Sir Thomas Egerton, *Knt.* Solicitor General.

CASE 1.

The Warden of All-Souls College in Oxon against Tanworth.

If *seign* be
pleaded by the
warden and fel-
lows of a col-
lege, it need
not say *jure*
collegii, &c. &c.
Plowd. 102.
103.
Leon. 153.
And. 272.
2 *Lev.* 68.
Vent. 223.
Cro Car. 215.

A WRIT OF RIGHT was brought by *Custos et Collegium* of All-Souls in Oxon. The writ was, "*quod clamant tenere de nobis in liberam puram et perpetuam elemosynam, et quod clamant esse jus et hereditatem suam, &c.*"—Exceptions were taken to the writ.—First, It ought to be "*in liberam elemosynam*," and not "*puram et perpetuam*."—Secondly, It ought to be *elemosynam* with a double *et*.—Thirdly, They ought not to shew any tenure in special, but generally *tenent de nobis*.—Fourthly, For that they say not *in jure collegii*.—*Sed non allocantur*. For the first is but surplussage, and not material. The second, the common course is so, and therefore it is good. Thirdly, They did well to express the tenure; for otherwise it might be taken for a tenure *in capite*, which they do well to avoid. Fourthly, When the writ is brought by *Custos et Collegium*, this cannot be but *in jure collegii*, as in their incorporation; for they have no other capacity; and the precedents are both ways.

CASE 2.

Perrot against Austin.

A testator can-
not bind his
executor where
he is not bound
himself.

Co. Lit. 386. a.

THE case was, *A.* covenanteth with *B.* to put his son an apprentice to *C.* otherwise that his executors shall pay *B.* twenty pounds. *A.* doth not put his son an apprentice to *C.* and dieth; *B.* brings debt against the executors of *A.*—And it was resolved by THE COURT, that it lieth not for two causes.—First, It cannot be a debt in the executor, where it was not debt in the testator: and if one covenants to pay ten pounds, debt lieth against him or his executors, as 40. *Edw.* 3. and 28. *Hen.* 8. *Dyer*, are: but if he doth covenant that his executors shall pay ten pounds, an action lieth not against them.—The second reason. The first part of the deed sounds in covenant, and the second part shall be of the same nature and condition. *Quare* of this reason?

Vide 3. *Burrow*, 1383. *Ld.* Mansfield's opinion of this case. 2. *Vern.* 322.

Oglethorp against Hyde.

CASE 3.

DEBT upon an obligation to perform covenants. The defendant pleadeth generally performance of covenants, where some are in the negative, and some in the affirmative.—It was held, that this is but matter of form, and is aided by the statute of 27. *Eliz.* except the party sheweth it for cause of his demurrer, that some of the covenants are in the negative, and some in the affirmative; for the Court shall adjudge according to the truth of the matter. But if any of the covenants are in the disjunctive, it is otherwise; for the Court cannot know which of them in the *disjunctive* he hath performed.

To covenants some negative, and some affirmative, performance pleaded generally is good, except upon demurrer: but performance of disjunctive covenants must be specially pleaded.

Ante, 62. Post, 697. 253. Co. Lit. 303. b. 8. Co. 133. b. Cro. Jac. 560. 1. Lut. 581. 1. Leon. 311. Allen, 72. Style, 63. 1. Bac. Ab. 548. Ld. Ray. 597. Cowp. 578.

Ascue against Fuljambe.

CASE 4.

AUDITA QUERELA, because execution was sued upon a statute acknowledged in the city of *Lincoln* as a statute-merchant, which had but one seal, where it ought to be with two seals, according to the statute *de mercatoribus*, 13. *Edw.* 1. And issue was joined, if it were sealed with a seal of two pieces, and tried for the plaintiff by a jury of the city of *Lincoln*.—It was allowed in arrest of judgment, that the issue ought to be tried by the certificate of the mayor, and not *per pais*. CURIA contra. For this is a matter of fact, and no parcel of the record.—The second cause. *Lincoln* is in the margent, so it shall be intended to be tried by *pais* of the county of *Lincoln*, whereas it was and ought to be tried by a *venue* of the city.—Thirdly, A writ of error lieth upon this matter, and not an *audita querela*, 18. *Edw.* 3. 25. where error is in suing execution. But it was held clearly, that where a statute is erroneously acknowledged, as here, no writ of error lieth, but an *audita querela* (a); for this is no record. But if it be well acknowledged, and removed hither, and execution is here erroneous, error lieth thereof.—Fourthly, This shall be taken as a statute acknowledged according to the statute of *Acton Burnell* of 11. *Edw.* 1. and not according to the statute 13. *Edw.* 1. *de mercatoribus* (b); so it is good for the goods and body. CURIA contra. For the consuee having sued execution upon it as a statute-merchant, he shall not now be received to say, but that it was acknowledged according to that statute for which the plaintiff had judgment (c).

An issue whether a *statute merchant* was duly sealed shall be tried by jury; and an *audita querela*, and not error, lies upon the judgment; in which if the *consuee* has sued execution, he cannot say it is a *statute staple*. Post, 319. 810. 1. Leon. 229. 233. Owen, 142. Dyer, 35.

(a) See 2. Bac. Abr. 196. 333. in notis. (b) See 8. Geo. 1. c. 25. (c) The judgment was affirmed on a writ of error in the king's bench. Vide post. 319.

Brunkhorne's Case.

CASE 5.

SCIRE FACIAS against *Brunkhorne* and others, bail for one *Parker*. Their recognizance was, "if *Parker* were condemned, that he shall pay the debt within such a time, or render his body to prison." *Parker* being condemned, and not rendering his body to prison, *scire facias* was brought against them. Upon this recognizance they pleaded, that *Parker*, such a day before the day in the recognizance, paid the money.—And this was held a good plea without a specialty; for the recognizance, as to them, is but as an obligation with a condition, upon which they might well plead performance. Vide contra, *Ordeway's Case*, ante 132. But

If the principal pay the sum recovered, the bail may plead it as performance of the recognizance. Post, 238. 1. Ro. Ab. 335. 2. Lev. 212. 1. Mod. 34. 1. Vent. 49. 1. Bac. Ab. 218. the

BRUNEHORNE's the party in the *scire facias* upon this recovery cannot plead it, except satisfaction be acknowledged upon record; for by *nude* payment he shall not avoid a matter of record.

CASE 6.

Leonard *against* Bacon.

"*Non tenore*"
pleaded after a
feoffment to
avoid a *formedon*
is fraudulent.
Savil. 126.
1. Mod. 181.
2. Com. Dig.

FORMEDON. The tenant pleads "*non-tenure*;" and upon this they were at issue: and it was found, that before the writ purchased, the tenant enfeoffed divers persons, to the intent to defraud them which had cause of action for the same lands, and notwithstanding he took the profits.—And this verdict was adjudged for the demandant, for the feoffment was void against him by the statute of 13. *Eliz.* c. 5.

575-
1. Bac. Ab. 603, 604. Cowp. 434. Dougl. n. (1.) 463.

See 25. *Edw.* 3. c. 16.

CASE 7.

Hayes *against* Allen.

In what man-
ner a messuage
shall be reco-
vered against a
discontinuee,
who has built
a new house,
part on his own
land and part
on the land dis-
continued.
5. C. 1. And.
305.
Post. 186. 290.
611.

SUR CUI IN VITA of a messuage. The parties being at issue, it was found by verdict, that a discontinuance being of the messuage, the discontinuee pulls it down, and erected a new house on part of the land discontinued, and part upon his own land adjoining; and, If upon this matter the writ was well brought of the intire messuage, or that it was to have been brought of such part of the house, and how the judgment should be in this case? was the question.—After argument, it was adjudged for the demandant, that the writ was well brought by the name of the whole messuage, and there needed not *foreprise*; for the action is to be brought as the land is at the time of the bringing the action, and there is no other form of writ in the Register but for the intire house: and it was adjudged, that the demandant shall recover. But the judgment was entered specially, that the demandant should recover *messuagium prædicti scilicet*, so much in length, and so much in breadth, according to what the verdict found upon the land in demand. *Vide Co. En.* 642. the record of this case. *V.* 39. *Hen.* 6. 8. 33. *Edw.* 3. "Entries," 80. 11. *Hen.* 4. "Dower," 175. & 179. 16. *Edw.* 3. "Brief," 650. 32. *Hen.* 8. *Dyer*, 47. *F. N. Br.* 192. —NOTA, That *Mich.* 33. & 34. *Eliz.* *Roll.* 111. a writ of error was brought, and the error was assigned in the very point adjudged: and after argument, the judgment was affirmed.

1. *Burr.* 138.

CASE 8.

Clark *against* Penruddock.

Exceptions to a
writ of *quid*
procurat.

THE case adjudged, as it is reported 5. *Co.* 100. b. against the opinion of **ANDERSON**.—But two exceptions were taken to the writ.—First, That it did not warrant the count, for the writ was *prosterne domum*, and the count was *prosterne penthouse*; and so variant, and not warranted by the writ.—*Sed non allocatur*; for so is the form in the Register, *prosterne domum*, where only part is to the nuisance.—Second exception, That the writ is *modo querentis*, but sheweth not how the messuage came to him; for if he cometh to it *in le poss.*, as by disseisin, there is no colour for him to have remedy. *Sed non allocatur*; for the count maketh it sufficiently certain.

By 5. *Gen.* 1. c. 13. judgment shall not be stayed, after verdict, for any variance between the writ and declaration.

Atkinson

Atkinson *against* Atkinson.

CASE 9.

ACTION for words: "I have served thee with the queen's letter, for stealing of goods out of my mother's house."—Upon not guilty pleaded, and found for the plaintiff, it was adjudged, that the action did not lie; for the defendant doth not say *expressly*, that he had stolen the goods, but that he had served him, &c. which may be, though he did not steal them; so it is only a charge by implication.—PERIAM cited a case of one *Nowel*, a clerk of this court, where the words were, "Thou wast cubbed up for forging of writs;" and ruled no action lay.

Slander must
be *expressly*
alleged.

Cro Car. 268.
Cro. Jac. 154.
Hob. 177.
2. Will. 300.

Bighton *against* Sawle.

CASE 10.

IT was agreed by THE COURT, that where judgment was given upon demurrer, that after a writ of inquiry of damages is returned, before a new judgment given upon it, the defendant may allege any matter in arrest of judgment.—But PERIAM said, this is where the damages are the principal; but in debt, where the debt is the principal, and he hath judgment to recover, and a writ of inquiry of damages, it is otherwise.—And ANDERSON said, that in *Pratt and Ruffel's Case*, where a judgment was given in the queen's bench, before the 27. Eliz. c. 8. and the writ of inquiry of damages was returned after the statute, and then the judgment was given upon it; that this judgment, by the opinion of all THE JUSTICES, was reversable by force of that statute.

Matter may be
alleged in ar-
rest of an inter-
locutory judg-
ment.
Post. 914.

11. Co. 42. a.
1. Leon. 309.
2. Mod. 265.
Salk. 17.

Owen Joans *against* Elizabeth Hoel.

CASE 11.

Easter Term, 33. Eliz. In the Exchequer.

Trinity Term, 32. Eliz. Rot. ultimo.

EJECTIONE FIRMÆ of seven closes, one called *Greenmead*; and so gave to the other several names. After verdict found for the plaintiff, upon not guilty pleaded, it was moved in arrest of judgment, that he ought to count of a certain number of acres; for now no writ of execution can be awarded to put him in possession; and so it is in every *præcipe* for land.—CURIA *contra*. That is well enough; for when a name is given to every close, although the content of the acres are not mentioned, *viz.* so many of land, so many of pasture, &c. it is sufficient, though it were more formal to express the acres; and it is aided by the statute of *jeofails*, and the Court is ascertained of the truth.—And POPHAM, Attorney, said, he had known it thrice so adjudged.—And the plaintiff had judgment.

In ejectment for
land it is not
necessary to
state the quan-
tity of acres,
if it is otherwise
sufficiently de-
scribed.

See post, 339.
854.
11. Co. 55. a.
Cro. Jac. 435.
Cro. Car. 573.
1. Salk. 254.
Carth. 204.
4. Mod. 97.

3. Lev. 96. 1. Burr. 623. 2. Bac. Abr. 169.

Trinity

Trinity Term,

33. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*Sir Francis Gawdy, *Knt.*John Clench, *Esq.*Edward Fenner, *Esq.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*} *Justices.*

CASE 1.

To cause another to be arrested in the name of a person who has not consented to such arrest, is not within 3. *Eliz. c. 2.*

2. *Inst. 444.*1. *Saund. 228.*1. *Raym. 135.*2. *Mod. 51.*1. *Ld. Ray. 381.*

ACTION upon the 8. *Eliz. c. 2.* for causing him to be arrested in the name of *Baildree*, and three others, where the three others never consented to it; and that this was for vexation, none of them having cause of action. The defendant pleaded not guilty; and found for the plaintiff.—And it was moved in arrest of judgment, that this case is not within the statute: for if he causeth one to be arrested in the name of one of the plaintiffs, though the other do not assent, he is out of the statute; for he hath colour to do it, and it cannot be said to be maliciously done; for one of the parties may give him sufficient authority to sue.—To which it was answered, that then the statute shall be defeated; for then one that is a beggarly person, and cannot pay costs, yet peradventure may consent that one shall sue in his name, and of the others, especially in an action of trespass, but otherwise in an action of debt.—And of this opinion were WRAY and GAWDY: but THE OTHER JUSTICES *contra*, that it is out of the statute, for the reason given before.

A public statute need not be recited; but if the party undertake to do it and recite it falsely, it will be fatal.

1. *Bull. 218.*1. *Ld. Ray. 382.*1. *Sid. 214.*2. *Sid. 162.*1. *Post. 245.*1. *Ante. 57.*

Cre. Car. 229. 232. 2. Mod. 99. 4. Bac. Abr. 658; 659. 3. Hawk. 349; 351.

CASE 2.

Teddcastle against Holliwell.

Michaelmas Term, 32. & 33. *Eliz. Roll 423.*

On a bond conditioned to pay within one month after notice, the value of such goods as an apprentice should mispend; proof must be given to the obligor, before action brought, that the goods have been mis-spent. *Ante. 305. Post. 470.*

DEBT upon an obligation. The condition was, That whereas *J. D.* hath bound himself to be an apprentice with the plaintiff, if the said *J. D.* during his apprenticeship, or any other by his assent or procurement, take or riotously mis-spend any goods of the plaintiff; if then the defendant, within one month after notice thereof given to him, satisfy and pay to the plaintiff for all such sums of money or wares, &c. so taken or notoriously spent by

the said *J. D.* or any other by his procurement or consent, the same being sufficiently proved, that then, &c. The defendant, *pro- testando* that the said *J. D.* nor any person by his consent (not making mention of procurement) had not taken nor riotously spent any goods of the plaintiff, &c. for plea saith, that the plaintiff had not sufficiently proved before action brought, that the said *J. D.* had taken or riotously spent any goods of the plaintiff: upon which plea the plaintiff demurred.—It was argued by DANIEL *for the plaintiff*, and by GODFREY *for the defendant*. And the question only was, If the proof should be in this action, or by any other means before; and what proof shall serve? *Vide* 10. *Edw.* 4. 11. 7. *Rich.* 2. *Bar.* 241. and *Scroggs' Case*, *antea*, *Mich.* 32. & 33. *Eliz.*—GAWDY and FENNER, *Justices*, conceived the proof must be before the action brought by some collateral means (but said not what means or in what manner); for the defendant is not to pay, but so much as is taken and proved to be taken or spent, &c. and this within one month after notice; so he is to have time to pay after proof made, and notice given; and this cannot be in this action.

But much was not spoken to it, for there was an incurable fault in the pleading: for he for plea saith, that the plaintiff had not made proof that *J. D.* took or riotously spent, &c. but speaks not, that any other by his consent or procurement; and so doth not answer to the substance of the condition; and for this it was held clearly ill: and for this cause it was adjudged for the plaintiff, although it was said, *qui per alium facit per seipsum facit*; so the plea extends to it. But THE COURT *contra*. But for the matter in law, they said it was strong against the plaintiff.

Salteston and Offely against Payne.

CASE 3.

THE plaintiffs, sheriffs of London, brought an action upon the case, for that the defendant, being in execution under their custody for 53*l.* at the suit of *Spicer*, had escaped, the said *Spicer* not satisfied; for which they were compelled to pay the debt. The defendant pleads, confessing all the matter, and that after this escape *Spicer* had acknowledged satisfaction of record. Upon this it was demurred.—And THE COURT held clearly, that an action upon the case lieth against a prisoner for an escape out of execution, to the intent to make the sheriffs chargeable with the debt; and so adjudged between *Hill and Holt*, *quod vide antea*, 53. that the sheriff shall have an action, *quia onerabilis*. *Fitz. N. Br.* 130. b. 13. *Hen.* 7. pl. 2. 14. *Hen.* 7. pl. 1. But here, because the defendant is to be charged, for that the plaintiffs are chargeable with the debt, and not otherwise; and the defendant hath pleaded satisfaction acknowledged upon record, which may be by his means, which is not denied, for otherwise the plaintiff might have shewn the special matter by replication; and so the plaintiffs are to have no loss, and so no cause of action; it was adjudged for the defendant, and the plaintiff *nihil capiat per billam*.

See 8. & 9. Will. 3. c. 27.

Mountney against Andrews.

CASE 4.

SCIRE FACIAS upon a judgment in debt. The defendant pleads, that upon a *feri facias* directed to the sheriff of the defendant may plead execution on a *feri facias* for the same debt, without shewing that the writ is returned. *Ante*, 209. 233. *Post.* 350. 597.

TEDCASTLE
against
HOLLIWELL.

2. Roll. Ab. 594.
Hutt. 98.
Hob. 66.
1. Bl. Rep. 387.
Doug. 214. 384.
1. Term Rep.
287. 291.

A plea to debt on bond, must answer the whole substance of the condition.
Post. 239.

A sheriff who is chargeable with the debt upon an escape, shall have an action for the misfeasance against the prisoner; but if satisfaction be entered, he must reply that it was not made by the defendant, or it will be a bar to his action.
Godb. 125.
1. Leon. 237.
3. Co. 52. b.
Moor, 569. 660.
Lut. 64.
Cro. Car. 109.
Cro. Jac. 486.
1. Mod. 660.
Imp. Sh. 191.
3. Burr. 1349.

To a *feri facias* on a judgment.

MOUNTNEY
against
ANDREWS.

5. Co. 90.

Moor, 468.

4. Leon. 194.

1. Sid. 29.

3. Salk. 318. 322.

6. Mod. 293. 299. fol. 208. 9.

1. Roll. Ab. 893. Dyer, 98. B. R. H. 348. 2. Ld. Ray. 1072. The case of Cooper v. Chitty,

1. Burrow, 20. to 38.

county of *Leicester*, for levying the debt, he by force of it took divers sheep of the defendant's for the debt, and yet detaineth them.—And this was ruled a good plea *PER CURIAM*; although he doth not alledge that the writ is returned, and although the writ is conditional, *ita quod habeas denarios, &c.* for the plaintiff hath his remedy against the sheriff, and the execution is lawful, which the defendant cannot resist. *Vide antea, Rook's Case, Mich. 32. & 33. Eliz.*

Allen against Hill.

Michaelmas Term, 32. & 33. Eliz. Roll 54.

If a house be devised to A. for life, "PROVISO, *if she depart, she shall have the rent,*" the life estate is determined by her departure, and till the entry of him in remainder she continues tenant at sufferance only.

Cro. Jac. 170.
See Taylor v.
Hord, 1. Burr.
60. to 127.

EJECTIONE FIRMÆ, for a house in *Cornhill, London*. Upon a special verdict the case was, *Fr. Benson* being seised of the house in fee, 4. *Eliz.* devised it to *Agnes* his wife for life; and after to the heirs of his body, the remainder to *Tb. Benson* his brother in fee: "PROVISO, that if the said *Agnes* clearly departs out of *London*, and dwell in the country, that then she shall have a rent out of the said house, &c." And found further, that *Francis* died without issue, and that *Tb. Benson* died, and that *R.* is his heir; and that afterwards, 15. *Eliz.* *Agnes* totaliter departed from *London*, and went to *Milton* in *Suffolk*. And after the said *R.* before entry made by him and the executor of *Francis* released to *Agnes*; and afterwards entered, and let to the plaintiff; and that *Agnes* married one *Huggins*; and the defendant entered by his commandment.—The substance of the matter was, If this PROVISIO doth determine the estate before entry? for if so, she was tenant at sufferance, and the release could not inure to her estate: for it was agreed, it was a good PROVISIO to make her estate to determine; although there be no words "*to cease,*" or "*that it shall be void;*" but being in a will, it is implied in the words, "*that then she shall have a rent;*" which cannot be, if her estate be not determined.—THE JUSTICES said, she is but tenant at sufferance; for if the devise had been express, that if she doth such an act her estate shall cease; after such a act done, though she continue in possession, and dieth, this is no freehold in her; and here is as much in substance. And WRAY said, it was held at an assembly of all the Justices, that if tenant *pur auter vie* continue in possession after the death of *cestuy a que vie*, he is but tenant at sufferance, and his discent shall not take away an entry; which GAWDY agreed, and that 18. *Edw. 4. pl. 25.* is not law.

A venire facias de novo shall not be awarded where judgment may be given on the verdict.

8. Co. 65.

Cro. Jac. 210.

Barnes, 478.

Strange, 513.

Dougl. 362. 378.

2. Will. 367. 377.

8. Ter. Rep. 151.

But there was a default in the verdict; for it was found that she totaliter departed from *London*, and went to *Milton* in *Suffolk*; but it was not found that she dwelt out of *London*; and this is part of the condition: and this not being found, it is not found that the condition is broken; and then, notwithstanding any matter found, the entry of the defendant is lawful. And it was moved, that as to it a venire facias de novo should issue to examine this point better, if she dwelt in the country; for it was said in this point, the verdict was not well examined.—But THE COURT held, that the verdict is full, upon which a judgment might be given, and then no venire facias de novo is to be awarded; for it is found for the defendant, when it is not found that the condition is broken:

and for this cause only it was adjudged for the defendant.

But then it was objected, that the life of *Agnes* was not found (a), and then the defendant cannot enter.—FENNER said, it shall be intended she is living; for the jury did not doubt of it; for they find, that if his entry upon the matter found is lawful, that he is not guilty: so they doubted of nothing but that point; and so it was adjudged in 28. *Eliz.* in this court (b).—And judgment was, *quod querens nihil capiat per billam.*

dist. Jenk. Cent. 262. 5. Co. 97. a. Hob. 55. 262. Cro. Jac. 64. 442. Cro. Car. 458. Vaugh. 150. Salk. 249. 1. Tern. Rep. 141. (a) See 21. Jac. 1. c. 13. (b) Scovel v. Cable, Moor, 268.

Allen
against
Hill.

In what case the court will intend and supply a fact not expressly found in a special ver-

Simonds against Lawnd.

CASE 6.

TRESPASS. The jury found a special verdict, that *R. Lawnd*, father of the defendant, was a copyholder of the land in fee, and surrendered it to the use of the defendant in fee, upon condition he should perform the covenants in such an indenture. The defendant after admittance surrendered the land to the use of the plaintiff in fee, upon condition, if the defendant paid ten pounds, the surrender to be void. The defendant neither paid the ten pounds, nor performed the covenants in the indenture. The father enters, and dieth seised; and it descends to the defendant, and he enters, upon whom the plaintiff enters. The question was, If this entry were lawful?—And adjudged it was not; for by the entry of the father, both the surrenders are defeated; so the defendant may confess and avoid what was done to the plaintiff.—And it was adjudged for the defendant.

A surrenderer who re-enters for a condition broken shall be reinstated in his former estate.

Co. Lit. 202.
1. Roll. Ab. 474.
1. Wood's Com.
14.
Gilb. Ten. 277.
1. Bac. Abr.
471, 472.
1. Term Rep.
600.

Johns against Gittings.

CASE 7.

Hilary Term, 32. Eliz. Roll.

ACTION FOR WORDS: "Thou hast played the thief with me, and hast stolen my cloth, and half a yard of velvet." The defendant pleaded, that the plaintiff was his tailor, and that upon the day of, &c. he delivered to him a yard and half of velvet, to make him a pair of hose, and he made them too strait: *ratione cuius*, he spoke these words, "Thou hast stolen part of the velvet which I delivered you," *ABSQUE HOC* that he spake any words *aliter vel alio modo*. Upon which the plaintiff demurred; for the plea and traverse do not confess any words of slander, and then the traverse is merely void. *L. 5. Edw. 4. pl. 26. 9. Edw. 4. pl. 15. 37. Hen. 6. pl. 34. 22. Hen. 6. pl. 17.*—And of this opinion was THE COURT: but a manifest fault was alledged in the plea, for he did not answer to the words, "Thou hast stolen my cloth," so it is vicious, and cannot be cured. And it was adjudged for the plaintiff.

A special plea must traverse and answer the whole of the declaration.
Aute, 153. 237.
4. Bac. Ab. 517.
5. Com. Dig.
222.

Gastrell against Townsend.

CASE 8.

ACTION FOR WORDS: "Thou hast sought the blood of my husband, and wast his death; for if thou hadst been an honest woman, he had been alive yet:" and avers *in facto* that her husband was killed.—It was moved, the action lieth not; for it is not said she did any unlawful act; and it was cited to be adjudged *Mich. 18. & 19. Eliz.* that for these words, "Thou wert the death of *J. S.*" action lieth not, for it may be by grief.—But it was ruled here, that the action lieth, for they shall be taken to be spoken in *malam partem*: and it was adjudged for the plaintiff.

Words actionable.

CASE 9.

Elsden and Page *against* Barnes.*Hilary Term, 33. Eliz. Roll 519.*

Outlawry reversed for a literal variance between the writ and the exigent. Ante, 50.

2. Leon. 120.
Cro. Jac. 576.

ERROR to reverse an outlawry in trespass.—First, The plaintiff in the original was named *Barnes*, and in the exigent *Bernes*; so an *e* for *a*. GAWDY held it no error, because it was in the name of the plaintiff. FENNER *contra*; for the exigent issued at the suit of a wrong person.—Second, The original was *blaba sua*, and the exigent was *blada*. And this was held a plain variance, and the outlawry reversed.

CASE 10.

Downes *against* Savage.*Trinity Term, 32. Eliz. Roll 772.*

Conuſance of a fine taken by one where the *dedimus* is to two, is erroneous. 2. Ba. Abr. 528. 538. Cruise on Fines, 80.

ERROR to reverse a fine in *Chester*. The conuſance was taken of it by one, and the *dedimus potestatem* to him and another jointly: and this was erroneous.

CASE 11.

Ashbrooke *against* Snape.

If an obligor promises to pay, an *assumpsit* will lie. Post. 242. 283.

Cro. Car. 415. Cro. Jac. 110. Yelv. 84. Cowp. 128.

IT was agreed by all THE JUSTICES, that if one be bound in an obligation, and afterwards promiseth to pay the money, *assumpsit* lieth upon this promise; and if he recover all in damages, this shall be a bar in debt upon the obligation.

CASE 12.

Barnes *against* May.

In *assumpsit*, if the day and place of the request be alleged in one of the counts, it is enough.

ASSUMPSIT. That whereas he sold to the defendant a pack of wool for twenty pounds, to be paid at a day certain, and *licet requisitus*, viz. at such a day and place, &c. he had not paid it; and that he sold to the defendant another pack of wool for ten pounds, to be paid when required; *et licet similiter requisitus*, &c. without alledging day and place: yet adjudged good; for it shall refer to the first day and place of request.

CASE 1.

The Queen *against* the Archbishop of York and S. Buck.*Trinity Term, 33. Eliz. In the Common Pleas.**Hilary Term, 33. Eliz. Roll 2350.*

The crown shall not be dispossessed by usurpation of an advowson in right of the duchy of Lancaster. Post. 519.
S. C. 1. Leon. 226.
Owen, 15.

QUARE IMPEDIT, for disturbing to present to the church of *Ackworth*, as in right of the duchy of *Lancaster*. And declared, that whereas *Henry* the eighth was seised, &c. and presented *R. dean*, *Henry* the eighth dieth, and it descended to *Edward* the sixth, and from him to queen *Mary*, and from her to queen *Elizabeth*, and that it became void, &c. The archbishop pleaded, that *Henib* his predecessor was seised of the advowson as in gross, and collated to it *J. S.* his clerk, who was admitted, instituted, and inducted, and died seised; and so pleaded three several collations one after another, and demanded judgment, if action lay against him by the queen. The other defendant incumbent pleaded the same plea. Upon this it was demurred; and the question was, If this double or treble usurpation put the queen out of possession of an advowson which she had in right of the duchy of *Lancaster*?—And adjudged it did not (*a*): for she shall have her privilege in this as if it

(a) See 7. Ann. c. 18. Cro. Jac. 124.

had been in right of the crown; and for such advowson a double usurpation did not put her out of possession, as it hath been adjudged. And here is no usurpation, but a collation, which shall not put a common person out of possession. And it was adjudged for the queen, and a writ to the archbishop of *Canterbury*.

NOTA. An exception was taken that the writ was general, and did not mention that the queen had it in right of the dutchy; but the count was special, and shewed it: but it was awarded good; and so is the Register, and a precedent shewn in 32. *Hen. 6.* accordingly.

THE QUEEN
against
The Archbishop
of York, &c.

Post. 811.
6. Co. 29. b.
1. Leon. 225.
1. Mod. 255.
Ante. 234.
3. Com. Dig.
202.

Hall against Turbett.

CASE 2.

REPLEVIN. The defendant justifieth by reason of a fine assessed by a steward in a court leet, for not coming to the court and doing his suit; and for it a distress taken: and upon this it was demurred.—And all THE JUSTICES held that the assessment being without presentment, that he ought to do suit at court, was without warrant; and in such case he shall be rather amerced than fined. For ANDERSON said, for such offences as are within the consuance of the steward as judge, and of which he hath the view, he may assess a fine; but of others not, except they be presented; and *non constat* to the steward, if he were resident within the leet or not, or what cause he had for his absence. And PERIAM said, if he shall assess the fine, he will assess it too grievous; and so the party shall have no remedy. But for ameracements, a *moderata misericordia* lieth. 10. *Hen. 6. pl. 7.*—And for this cause the plaintiff had judgment.

The steward of a leet cannot fine for not doing suit without a presentment, and then he shall be amerced.

Moor, 89.
Kitchen. 43. a
Co. 8. 41. a.
Andrews, 47.
Post. 860. pl. 33.
5. Com. Dig.
174. 175.

Kindler against Leverage.

CASE 3.

REPLEVIN. The case was, A. seised of the land, made a lease at will, rendering six pounds *per annum*; and by another deed reciting this rent, he granted *eundem redditum* to the defendant for his life: the lease at will determines; the question was, If the grantee shall have this rent for his life, according to the words of the grant?—And resolved he should, for *eundem* shall be taken for *talem*, viz. *eundem in specie*: viz. six pounds *per annum*: as in the queen's patent of a grant of *easdem libertates* to *Islington*, *quas London. &c.* this is not the same, but *tales libertates*. And it was afterwards adjudged for the avowant, that the rent shall continue during his life.

Ambiguous words shall be taken strongly against a grantor, and beneficially for a grantee.
Plowd. 10.
Cowp. 600.

Margaret Palmes against The Bishop of Peterborough.

CASE 4.

QUARE IMPEDIT. He pleads, that he demanded of J. S. the presentee of the plaintiff, to see his letters of orders, and he would not shew them; and for this cause, for that he was not ascertained whether he were deacon or not: and also he demanded of him letters missive, or testimonials testifying his ability; and because he had not his letters of orders, nor letters missive, nor made proof of them otherwise to the bishop, he desired leave of the bishop to bring them; and he gave them a week, and he went away, and came not again; and that the six months past, and he collated by lapse. And upon demurter upon it, it was adjudged for the plaintiff; for these were not causes to stay the admittance; and

A presentee need not shew his orders, and a plea *pro eo quod non monstravit* to *qu. imp.* is bad.
Post. 441.
5. Com. Dig.
71.

PALMES
against
Bp. of PETER-
BOROUGH.

Co. 5. 57. a.
1. Saund. 117.
2. Salk. 539.

the clerk is not bound to shew his letters of orders or missive to the bishop, but the bishop must try him upon examination for one and other; and the plea is not alledged *in facto*, but *pro eo quod non monstravit*; so all cometh under the "*eo quod*" and so no part of it is traversable. And for one and the other cause it was adjudged for the plaintiff.

CASE 5.

Reade against Johnson.

Assumpsit will
not lie for rent
arrear upon a
lease for years.
Ante, 240.

10. Co. 77. a.
Post. 786. 859.
1. Roll. Ab. 7.
Cro. Jac. 598. 668. Cro. Car. 343. Hob. 284. 1. Brownl. 14. 3. Lev. 150. Hard. 366. 1. Leon. 43. Allen, 29. Jones, 329.

ASSUMPSIT for twenty-four pounds. And declares upon an *indebitatus assumpsit*. Defendant pleads *non assumpsit*. The jury found, that the plaintiff let to the defendant land for seven years, rendering eight pounds *per annum*, and the rent was arrear for three years; and that the defendant did owe no other debt, nor made any other promise. *Et si, &c.*—And it was held by THE JUSTICES, that the action did not lie, but only an action of debt.

CASE 6.

Simpson against Titterell.

Michaelmas Term, 32. & 33. Eliz. Roll 914.

A *proviso* in a
lease with no
penalty annex-
ed is a condition;
but if a penalty
be annexed, it is
a covenant.
Ante, 73.
Post. 385.

1. Roll. Ab. 410.
Co. Lit. 203. b.
2. Co. 71. b.
1. Bac. Abr. 529.

EJECTIONE FIRMÆ. One Bendlows let the land to the defendant for years: *PROVISO SEMPER*, and it is further covenanted, that the lessee shall not assign his term to any other, except to the lessor, paying as much as another; and if the lessor will not have it, that then he may alien it to none except his mother or his son. The lessee assigned it to his mother; lessor entered, and let it to the plaintiff: the question was, If the words were a condition, or only a covenant?—And all the JUSTICES held it was a good condition to defeat the estate. For PERIAM said, *proviso* always implieth a condition, if there be not words subsequent, which may peradventure change it into a covenant; as where there is another penalty annexed to it for non-performance, as *Dockwray's Case*, 27. Hen. 8. pl. 14. But it is a rule in *provisors*, where the *proviso* is, that the lessee shall perform or not perform a thing, and no penalty to it, this is a condition, otherwise it is void; but if a penalty is annexed, *aliter est*: to which the rest of THE JUSTICES agreed.—And it was adjudged for the plaintiff, that the entry was lawful.

CASE 7.

Barret against Hevesett.

Easter Term, 33. Eliz. Roll 810.

Trespass of af-
fault, battery,
and wounding.
Plea, not guilty
as to the *vi et
armis*; and a
justification
mollior manus
imposuit as to
the residue, ad-
judged bad up-
on demurrer. Ante, 94.

TRESPASS for assault, battery and wounding, *apud Downham* in the county of Suffolk, 26. September, 21. Eliz. The defendant pleaded, *quod vi et armis* not guilty, and *quo ad residuum transgressionis actio non, &c.* For he said, that PHILIP Earl of Arundel was seised of sixty acres of pasture, called *Shepherd's-hole*, in Thetford, in the said county of Suffolk, and let them to Ro. Whitney, 28. Eliz. for twenty-one years; and that the plaintiff *tempore quo clausum prædictum fregit et cuculos ipsius Rob. ibidem inventos cum retibus et aliis ingeniis capere voluit*; for which the defendant, as servant to the said

Ante, 94. Lut. 929. 3. Lev. 404. 2. Vent. 193. Skinn. 387.

R. and

R. and by his commandment, *tempore quo et molliter manus imposuit* upon the plaintiff at T. in the said sixty acres, to hinder him from taking and carrying away the said conies, *quæ est eadem insultus et transgressio unde, &c.* ABSQUE HOC that he is guilty *de transgressione et insultu, &c. alibi vel alio modo in dict' com' Suff. prout, &c. et hoc.* Upon this it was demurred in law; and adjudged for the plaintiff.

BARRET
against
HEVESETT.

NOTA. This case was taken out of the record delivered to the reporter by BROWNLOW *prothonotary*.

Hartopp's Case.

CASE 1.

Trinity Term, 33. Eliz. In the Court of Wards.

ELIZABETH HARTOPP devised lands to Denham, and three others in fee, to the use of Thomas Hartopp her brother, and the heirs males of his body; and for default of such issue, to the heirs females of his body, with other remainders over. Thomas dieth, having issue a daughter, his wife *enseint* with a son, which is afterwards born. And afterwards Elizabeth Hartopp dieth.

The heirs of a devise in tail who dies in the life-time of the devisor cannot take under the will, for the estate never vested in the ancestor.

Post. 423.

The question was, If the son, or daughter, or neither of them should have the land?

And upon argument, it was ruled by WRAY and ANDERSON, Raym. 408. Chief Justices, KINGSMILL and MORRIS, Surveyor and Attorney of the Court of Wards, that neither of them should have the land. For it being devised to the use of Thomas, *ut supra*, and he dying before the devisor, this cannot vest in the heir, for it never vested in the ancestor; for the word "*heirs*" is not to give the immediate estate, but by way of limitation; and if this shall vest in the heir, it shall vest in him as a purchaser, which was not the intent of the devisor, and so shall be void. And they conceived the case doth not differ from *Bret and Rigdin's Case* (a): But because the office was not fully found, they would not resolve it; but a *melius inquirandum* was awarded.

Leon. 253.
1. Co. 101.
2. Lev. 243.
2. Jones, 135.
Pollex. 546.
Swinb. 35.
1. Stra. 25. 32.
(a) Plowd. 220.

R. 2

Michaelmas

Michaelmas Term,

33. and 34. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*Sir Francis Gawdy, *Knt.*John Clench, *Esq.*Edward Fenner, *Esq.*Sir John Popham, *Knt. Attorney General.*Sir Thomas Egerton, *Knt. Solicitor General.*} *Justices.*

CASE 1.

Kenson against Reading.

Hilary Term, 30. Eliz. Roll 542.

An exception in a deed of what has before been expressly granted is void.
Ante, 6.

2. Roll. Ab. 454.
Hob. 72. 170.
Cro. Car. 130.

TRESPASS. The case upon a special verdict was, The queen had the rectory of *Greenwich*, to which the manor of *D.* did appertain; and granted them *per nomen rectoria*, and all the lands, tenements, underwoods, and hereditaments to the same belonging, *salvis semper et omnino reservatis omnibus grossis arboribus boscis et maheremiis de et super premissis*: and, If by these words *boscis*, the underwoods which are before let expressly were excepted or not? was the question.—WINTER, *for the plaintiff*, argued that the underwoods are excepted.—FOSTER *contra*. For the underwoods being granted by express words cannot be excepted no more in the case of the queen than of a common person; for the exception of that which is expressly granted is void; otherwise it is of a thing that passeth only by implication: and here the word "*grossis*" extendeth to *boscis arboribus*, &c. and so nothing is excepted but *grossis arboribus*, &c. and not the underwoods.—And so was the opinion of THE COURT, that an exception in the queen's grant cannot be of that which is before expressly granted, and her intent here is apparent by the word "*grossis*" to except only the great wood; and it shall be referred as well to the trees as to the rest. And it was adjudged for the defendant.

CASE 2.

Hill against Pilkington.

Hilary Term, 32. Eliz. Roll 171.

Debt on bond conditioned for the performance of covenants, will lie on a breach of the covenants before the condition is performed, though the indenture becomes void before the action is brought.

3. Wood's Con. 411. 451.
Doug. 49.

DEBT upon an obligation. The condition was to perform covenants in a lease. The defendant pleads covenants performed. The plaintiff by replication shewed the covenants in the indenture; whereof one was, that he should enjoy such lands, let to him, quietly, without interruption; and sheweth *in facto*, that the defendant 20. March, 30. Eliz. had disturbed him, and in that assigneth the breach. The defendant by rejoinder sheweth, that in the indenture there was a *proviso*, that if he payeth 10l. the 31st of March, 30. Eliz. that then the indenture and all therein contained shall be void: and alledgeth that he paid the 10l. at the day; but this was after the disturbance supposed. Hereupon it was demurred.—And after opening of the case by BEVERCOTTS, *for the plaintiff*, it was adjudged without any great argument for the plaintiff. For by the covenant broken before the condition performed, the obligation was for-

seited; and it is not material that the covenants become void before the action brought.—But WRAY said, that if the *proviso* had been, that upon the payment of the 10l. as well the obligation as the indenture should be void, it had been peradventure otherwise; for then the bond was void before the action brought. The 35. Hen. 8. Dyer, 57. and *Bylowe's Case* was cited, where a parson made a lease for years, in which were divers covenants, and after he became non resident, by which the indenture became void; yet he might maintain an action of covenant, for a covenant broken before his non residency. *Vide Dr. Hector's Case*, *antea*, Mich. 29. & 30. B. R. *placito* 37. page 77, 78.

HILL
against
PILKINGTON

See 8. & 9. Will 3. c. 11.

Porter against Gray.

CASE 3.

Trinity Term, 33. Eliz. Roll 365.

AVOWRY for an amerciament in a leet. For that Edward the sixth granted the hundred of H. in which was a leet, to G. Owen in fee, who died seised, and it descended to J. Owen his cousin and heir; who being seised, granted it to Foster in fee; who by deed inrolled granted it to the Earl of Leicester in fee, who by deed inrolled granted it to Lord Norris in fee; and for that the defendant was resident within the hundred, and appeared not at a leet held 23d April 32. Eliz. he was amerced twelve-pence; and for that the distress, &c. Upon this avowry it was demurred in law.—First, Because he pleaded that G. Owen died, and it descended to J. Owen, his cousin and heir, and shewed not that G. died without issue. *Sed non allocatur*; for it shall be clearly intended.—Secondly, That he said that J. Owen did grant it to Foster, but shewed no deed of the grant. And it was ruled to be ill, for this cause; for it cannot be granted but by deed, which must be shewn.—Thirdly, That the defendant did not shew that the court was held within a month after Easter. And this was held a good exception, it being a leet by grant; but of a leet by prescription it is otherwise. 20. Hen. 7. pl. 22. 18. Hen. 6. pl. 11. And they were of opinion to give judgment for the plaintiff; but would advise, &c.

A leet cannot be granted but by deed, and it must then be holden on the day mentioned in the grant. *Ante*, 125.

2. Inst. 72.
2. Hawk. 90.

Love against Wotton.

CASE 4:

Hilary Term, 33. Eliz. Roll 188.

DEBT upon an obligation. The defendant pleaded the statute of usury made 6th Feb. 13. Eliz. (whereas the parliament did begin the second of Feb. 13. Eliz.) and that the obligation was taken by usury. The plaintiff replied, it was not made for usury, &c. *contra formam statuti modo et forma prædicti*. Upon this they were at issue, and found for the plaintiff.—And for that the statute was mis-recited, and it was a general law of which the Court is to take consueance;—although both the parties do agree there is such a statute, yet the Court well knowing there is no such statute, and so cannot be *contra formam statuti*, held no judgment could be given for the plaintiff, it being in the bar of the defendant;—THE COURT held it clearly ill; and that a repleader ought to be, although it was after verdict. And it was adjudged that there should be a repleader. 1. Mary, Dyer, 119.

A repleader granted after verdict, in debt on a bond, for the mis-recital of the time when the statute pleaded was made; notwithstanding the parties had admitted the existence of the statute, by their pleading. *Ante*, 236.

1. Burrow, 302. 4. Burr. 2146. Comyns, 143. 3. Bac. Abr. 111. 112. 372. 4. Bac. Abr. 632. Doug. 396. 747.

CASE 3.

Tayler against Fisher.

Easter Term, 32. Eliz. Roll 146.

A wife cannot give a person authority to enter her husband's house. Post. 876.

- 2. Ro. Rep. 55.
- 3. Leon. 267.
- Chap. Ca. 38.
- 6. Mod. 162.
- 5. Bac. Abr. 182.
- 2. Term Rep. 266.

TRESPASS for breaking his house, and taking away a corset and a pike of the plaintiff's. The defendant pleaded, that long time before the trespass supposed, *J. Bamfield* was seised of the said corset and pike as of his own goods remaining in the plaintiff's house, and that he sold them to the defendant; and thereupon he *tempore quo*, &c. came to the plaintiff's house and demanded them; and the wife of the plaintiff then and there (the plaintiff being absent) licensed him to enter into the house, and take them; and he thereupon entered, &c. and took them, as it was lawful for him to do, &c. And upon this it was demurred.—And after divers motions, it was adjudged for the plaintiff, that he should recover as to the entering into the house, but not as to the goods; for the goods being in the plaintiff's house, and it not appearing how they came there, *viz.* either as trespass or otherwise, he cannot of his own head enter; and the wife's licence to enter into her husband's house is not good, for she cannot give one authority to enter into her husband's house.—But *GAWDY contra*: for it may be intended the goods were there by the plaintiff's licence, and then he might well enter and take them: but the *THREE OTHER JUDGES contra*. And it was adjudged for the plaintiff. *V. 30. Ed. 3. 12.*

CASE 6.

Bretton & Elizabeth his Wife against Bolton of Gray's Inn.

An action on the case upon *assumpsit*, will lie for the non-performance of a promise to provide the plaintiff with better security, in consideration of her delivering up to a third person a bond in which the defendant and such third person were co-obligors, and lending such third person an additional sum of money.

- 1. Roll. Ab. 97.
- 2. Burr. 1005.

ASSUMPSIT. The plaintiffs declared, That whereas *Thomas Bolton* was the brother of the defendant, and the defendant was a counsellor, *et peritus in lege*; and whereas the defendant did know that the said *Thomas* was seised to him and the heirs males of his body, the remainder to the defendant, and to the heirs males of his body, of the manor of *Heywood* in the county of *Norfolk*; and that the said *Elizabeth* the wife of the plaintiff had lent 100l. to the said *Thomas*, for the payment of which sum, at a certain day to come, the said *Thomas* and the defendant were obliged by their writing obligatory *sigillo suo sigillat'* jointly and severally in 200l. the defendant, in consideration that the said *Elizabeth* at his special instance should deliver to the said *Thomas* the said writing obligatory to be cancelled, and should lend to the said *Thomas* another 100l. did assume to the said *Elizabeth*, that if she would refer to the defendant the making of the said assurance for the 200l. and would use no other counsel than the counsel of the defendant, that he would provide *talem assurantiam proinde pro prædict'* *Elizabetha per qualem ipsa eadem Elizabetha haberet majus advantagium* of the said *Thomas*, if he should make default of payment of the said 200l. than she had before for the said 100l. And alledged *in factis*, that she, trusting to his promise, used no other counsel, &c. and delivered to the said *Thomas* the said bond to be cancelled; and that she lent to the said *Thomas* the other 100l. And that the defendant not regarding his promise, but intending to defraud her, then and there knowing that the said *Thomas* was *ad tunc, ut præfatur*, seised in tail, *viz.* to him and his heirs males of his body (but faith not where the reversion or remainder was) then and there *falso et malitiose* provided for her assurance a grant of an annual rent issuing out

out of the said manor of *Heywood* to have in fee (and shewed it in certain) which was a rent-seck; which she, trusting to the said promise, received for the security of her 200 l. And alledged *in facto*, that the said *Thomas* within one year died without issue, by which after his death the said rent ceased and became void; and the said manor came to the defendant discharged of the said rent. And further alledged, that the defendant provided no other assurance for the payment of the said 200 l. and that the said 200 l. and every part thereof were yet unpaid; *et sic* the defendant falsely and maliciously deceived the said plaintiff in providing the said assurance for the payment of the said 200 l. by which she is without remedy for the payment of the said rent, or the said 200 l. *ad damnum* 400 l.—The defendant pleaded *non assumpsit*, and found against him.

DIVERS MATTERS were alledged in arrest of judgment.

FIRST, It was alledged, that whereas the said *Thomas* and the defendant were obliged *per scriptum suum obligatorium sigillo suo sigillat*; and so is uncertain, for it cannot be the bond of both, for it is *sigillo suo, &c.* in the singular number.—*Sed non allocatur*; for *sigillo suo* may be referred to both their seals, and both may use one seal.

Divers exceptions to a declaration on the case in *assumpsit*.

SECONDLY, The *assumpsit* is, that if she at his instance and request would deliver the bond, &c. and she alledgeth that she delivered the bond, &c. but saith not that she delivered it at his instance; and if it was not delivered at his instance, but upon some other consideration, as it may be intended, it is no performance of the consideration.—*Sed non allocatur*; for when she delivered the bond to be cancelled, it shall be intended upon the consideration before, and at the request of the defendant.

2. Vent. 71.
Cro. Jac. 404.

THIRDLY, For that it was alledged, that the defendant well knowing that the said *Thomas* was seised *ut præfertur* in tail, but saith not in whom the remainder was; and it might be to his right heirs; and then the rent-charge may have continuance.—*Sed non allocatur*; for when in the recital it is said that *Thomas* was seised in tail, the remainder to the defendant; and it is said afterwards that *Thomas* was seised *ut præfertur* in tail; this shall be intended with remainder over as before.

FOURTHLY, Upon the substance of the matter, that this assurance that was made was better than what she had before; for it is not alledged when the first 100 l. was to be paid, but at a day to come; which may be long after; and here the rent that was granted being an inheritance which charged the land, was a better assurance than a bond which charged the goods, for which she had no remedy if the obligor left no assets to his executor.—But THE COURT held clearly the contrary; for the bond charged his person and his executors after his death, but this rent did only charge his land during his life; and he being dead, she had no remedy.

FIFTHLY, The conclusion of the action sounds in nature of a deceit, and then the issue *non assumpsit* is no answer to that with which the plaintiffs have charged the defendant.—*Sed non allocatur*; for the plaintiffs having declared upon the whole matter, and having shewed to the Court sufficient matter that the defendant had not performed his promise, the conclusion is not material; but THE COURT shall adjudge upon the whole matter precedent; so it is a good issue. And the plaintiffs had judgment.

CASE 7.

Sir Richard Buckley against Wood.

See the Commencement of this Case, *Ante*, page 230. Case 21.

To charge another with felony or piracy by bill in equity is actionable; for the Court not having jurisdiction over these offences, it is not a proceeding in the course of justice. *Ante*, 230.

4. Bac. Abr. 499. 518.
2. Saund. 131, 132.
3. Term Rep. B. R. 111.

IT was now moved again by EGERTON, for the plaintiff, that the bill was not lawfully exhibited in the star-chamber, for matters concerning his life which were not examinable there, for then his own oath shall prejudice him; and if the action did not lie for the exhibiting, yet it lay when he spoke of it in the country; and spoke of the substance thereof (as it is expressly alledged in the declaration), and said that his bill, and all that was contained in it, was true; for this an action lieth, for this is not in a course of justice.—TANFIELD. If the bill contain any matter of slander of another than of him against whom it is exhibited, an action lieth; as in 2. *Eliz. Stanley v. Coursep*, where the witness goeth beyond the point in issue, or question, and slandereth a third person, action lieth: but here the exhibiting of the bill is only in course of justice, and concerneth himself only, and so is not punishable; and then his saying in the country that his bill was true, &c. is not punishable. And he said that the declaration is uncertain; for it is that the defendant did exhibit his bill, containing *inter alia* this matter which is not good; for it might be there were words of qualification in the bill which qualified the first words, and therefore the whole bill was to be recited.—But all THE JUSTICES held this exception not to be material; for if there were any words of qualification, they were to be alledged by the defendant; and it shall not be otherwise intended, but rather that it contained this matter of slander amongst other matters of slander. And for the matter, they all resolved that the action lay; for they were not matters examinable in star-chamber; and when he exhibited the bill maliciously in slander of the plaintiff for matters not examinable there, it is reason he should be punished; and especially when he spoke of the matters in the country, and published them and affirmed they were true.—But WRAY said, if the bill had been well exhibited, for which matters the Court might take examination, so that his complaint was in course of justice, an action did not lie, although they were false and scandalous; and if it did not lie for exhibiting the bill, then it lay not for saying that it was true.—But in the principal case they resolved *ut supra*. And the precedent *Bowes' Case* was seen in court, which was all one with this Case, except that the words "*inter alia*" were left out; and all the bill was recited. And afterwards at the end of the term it was adjudged for the plaintiff. 4. Co. 14. B.

Post. 564. 725.

4. Co. 15. 2.

C. 91 8.

Dalton against Sheffington.

Trinity Term, 32. Eliz. Roll 110.

3s. ante.
Ante, 35.

ERROR to reverse an outlawry. The original was *Sheffington*, and the mesne process *Skeffington*: and for this variance it was reversed.

CASE 9.

Atkins against Atkins.

Hilary Term, 33. Eliz. Roll 776.

Devise to S. and the heirs of his body, and after his decease to B. the eldest son of S. and the heirs of his body with remainders over, is an estate tail in S. 2. Eq. Caf. Ab. 315. *Ld. Ray.* 204. 1437. 1440. 1562. *Lucas*, 181. 2. *Peere Will.* 476. 3. *Strange*, 729. *Doughl.* 267. 757.

ERROR to reverse a judgment in *Norwich*, in a writ of dower. The case was, 7. S. devised land to S. and to the heirs of his body; and after his decease to B. the eldest son of S. and to the heirs of his body with remainders over, is an estate tail in S. 2. Eq. Caf. Ab. 315. *Ld. Ray.* 204. 1437. 1440. 1562. *Lucas*, 181. 2. *Peere Will.* 476. 3. *Strange*, 729. *Doughl.* 267. 757.

heirs of his body, the remainder over to three other of the sons of S. in the same manner. The question was, What estate S. had in the land?—HUBBARD argued that he had estate for life, the remainder to his sons as purchasers.—COKE *contra*, That he had an estate tail; for by the first words an express estate in tail was given to him; and there are no special words to correct or alter them.—It was afterwards adjudged that S. had an estate in tail; and that his wife should have dower: and the first judgment in the writ of dower was affirmed.

ATKINS
against
ATKINS.

Nelson and Bugg against Woodward.

CASE 10.

See the Commencement of this Case, *Ante*, page 188. Case 13.

PROHIBITION. The case was moved again.—GAWDY, *Justice*, held, that consultation should not be granted; for it is as a contract for tithes to come, which may be without deed, and may be for life or years, and it is a contract that goeth in discharge of payment of tithes; but a lease or grant of tithes must be by deed, 21. Hen. 6. pl. 43. and here a prohibition lieth to avoid circuitry of action.—And of this opinion was CLENCH, *Justice*.—WRAY, *Chief Justice*, and FENNER *contra*, That this is a sale, and cannot be without deed, and a grant and contract for tithes is all one; but a sale for one year may be of tithes without deed (a), and it is not reason he should make a deed to every one of his parishioners for each of their tithes for a year: and WRAY, *Chief Justice*, said, he had conferred with the Justices of his house, and they were of his opinion. And as to the circuitry of action, the plaintiffs here can have no action upon the promise; for this was made with P. And although they are assignees of the land, yet they can have no action.—*Et postea*, in Easter Term, 35. Eliz. it was adjudged for the defendant, that this agreement cannot be without deed, and the assignee hath no colour to take thereof advantage: and a consultation was granted.

(a) See 5. Geo. 3. c. 17.

A composition by parol, that in consideration of 5 l. paid to the parson, lands should be discharged of tithes during the parson's life, is not good.

Ante, 188.

2. Ro. Ab. 63.
Sed vide Yelv.
94.
Cro. Jac. 137.
and 3. Com.
Dig. 91. *contra*.
3. Bac. Ab. 337.
5. Bac. Ab. 93.

Leeks' Case.

CASE 11.

HE was indicted by the name of JOHN LEEKS, *alias* STYLE *de Dets.*—And it was held to be ill, for he ought to have his addition before the *alias dictus*: and so it was ruled in *Grymes' Case*, although both the names be not recited in the *alias*.

The addition of the defendant's name must be before the *alias dictus*. *Ant.* 198.

2. Hale, 178.*

Lacy against Lacy.

CASE 12.

ASSUMPSIT. That whereas the defendant was possessed of a lease for years, the reversion to the queen, in consideration of ten pounds paid by the plaintiff to him in hand, and of ten pounds to be paid to him upon the procuring of a new lease to the plaintiff, the defendant did promise to surrender his lease, and to procure a new lease to the plaintiff before the end of *Trinity* term; and that he had not performed it. Upon *non assumpsit* pleaded, it was found for the plaintiff. And it was said in arrest of judgment, that the declaration was not good, because he did not allege he was ready to pay the other ten pounds at the end of *Trinity* term.—*Sed non allocatur*; for it was not to be paid till the defendant procured the lease, so he was to do the first act. And the plaintiff had judgment.

Performance of a promise made in consideration of the previous performance of another promise, need not be averred.

CASE 13.

A declaration on a promise to deliver so much corn if the plaintiff liked thereof, must shew that the plaintiff gave notice of his approbation. See *vide post*. 834.

Brable against Hollywell.

Trinity Term, 33. Eliz. Roll 483.

ASSUMPSIT. The plaintiff counts, that the defendant upon a certain consideration promised to deliver to him forty quarters of wheat between *Sturbridge fair* and *Christmas*, if the plaintiff liked thereof at *Sturbridge fair*; and shewed he liked thereof; and upon the last of *November*, at such a place required, the defendant to deliver them, which he had not done. Upon *non assumpsit* pleaded, it was found for the plaintiff. And it was alledged in arrest of judgment, that the declaration is not good, because it is not shewn in the court that he shewed his liking to the defendant; and his liking is secret, of which the defendant cannot take notice; and therefore of necessity it must be alledged 17. *Edw. 4.* and so it was ruled this term in *Chapman v. Hurst*, which is entered *Trinity Term, 33. Roll 487.*—But it was answered, that his liking was sufficiently shewn, when it is alledged he required them at such a day.—But THE COURT held, this will not aid him, as this case is; for the liking is to be at *Sturbridge fair*, and here a request is alledged *ult. Nov.* which is long after, and at another place. And judgment was given for the defendant.

CASE 14.

An executory consideration may be traversed in *assumpsit*. Dougl. 471.

Anonymous.

ASSUMPSIT. The plaintiff declared, That the defendant, in consideration the plaintiff should serve him for one year, and manure his land, &c. promised to pay him forty shillings; and alledged *in facto* that he served him for one year, and manured his land, &c. The defendant pleads, the plaintiff did not serve him for one year, but departed from his service within the year. Upon issue joined, it was found for the plaintiff. And it was alledged in arrest of judgment, that the issue was not well joined, for it was a traverse of the consideration, which is not traversable.—But it was ruled good, and the plaintiff had judgment.—NOTA. The reason seemed to be, because it was a consideration executory.

Ante, 201.

CASE 15.

Words, the meaning of which are peculiar to the place where they are spoken, may be rendered actionable by the interpretation of an *innuendo*. Moor, 419. Yelv. 153.

Coles against Haveland.

ACTION for these words: "*Coles* hath strained a mare, *innuendo carnaliter cognovit equam.*" The jury found that the defendant spake the words, "*C. hath strained a mare,*" meaning *that carnaliter cognovit.*" And upon these words the plaintiff had judgment, although it was alledged that the words in themselves had no sense, and the *innuendo* will not help the matter, but only denote the person.—But because the verdict hath found precisely that this was his meaning, and it is a phrase of the country, it was adjudged for the plaintiff.

Carter, 214. Hob. 126.

CASE 16.

Words in the potential mood may qualify an indicative context, and render them not actionable. Ante, 6.

Cro. Jac. 331. 2. T. Rep. 473.

Stoner against Audely.

ACTION for these words, *viz.* "Aid me to *Stoner*, for I have a felony to lay to his charge, for he would have robbed me." After verdict for the plaintiff, it was alledged in arrest of judgment, that the words are not actionable; for perhaps the saying, "I have felony to lay to his charge," of themselves are actionable; but when he saith further, "for he would have robbed me," they prove no felony, but extenuate the first words, and shew what he did intend, and the last words are not actionable: for to say, "One would have robbed me," an action lieth not, without shewing some overt act put in ure, which is felony, or cause

cause to bind one to his good behaviour, for though he had an intent, peradventure he repented of it, and did no evil act.—And LEA cited a case adjudged in 27. & 28. Eliz. *Tettul & Osborne*, that these words, *scilicet*, “Thou wouldst have murdered me,” are not actionable.—And for this cause THE COURT inclined that an action did not lie. *Sed adjournatur.*

STONER
against
AUDELY.

Stapleton against Frier.

CASE 17.

Trinity Term, 33. Eliz. Roll 189.

ACTION for words: “My Lord President of the North shewed *Mr. Stapleton* his hand set to a book; whereby he had consented to the late rebels of the North; but by the means of *Mr. Fairfax*, my Lord President was persuaded, and the matter suppressed.”—After verdict for the plaintiff it was moved in arrest of judgment, that an action lay not; for it is not said he consented to the rebels; but that his hand was set to a book, whereby he did consent, &c. but sheweth not who set to his hand, and it might be done by another: also it is not said he consented to them in the rebellion, but the consent may be in some other matter, nor that he knew they were rebels: also it appeareth not in what they were rebels, if in treason, or only upon process of rebellion.—*CURIA contra in omnibus.* For it cannot be his hand, if he himself sets it not to the book, but another may write his name; and when he said he consented to the rebels, and shewed not any certain person, this cannot be otherwise intended but that he consented to all the rebels in their rebellion: but if he had said that he consented to *A. and B.* which were rebels, this peradventure may be intended that he consented to them in some other matter; as it was ruled 26. Eliz. in *Brown v. Lisle*, where the words were, “He was confederate with *Campion* the jesuit,” no action lay, for it is not said he knew him to be a jesuit, nor in what manner he was confederate with him. And in this term it was adjudged for the plaintiff.

Words action-
able.
Ante, 51. 487.
746.

Dullingham against Kyfeley.

CASE 18.

PROHIBITION. And surmised, that *Kyfeley* the defendant being proprietor of the parsonage of *Sapstow* in *Suffolk*, had sued *Curtis* in the court christian for tythes of certain land in the parish of *S.* The plaintiff, being parson of *Hemington* in the same county, came in *pro interesse suo*; and alledged there is a custom within the parish of *Sapstow*, that the parson of *Hemington* shall have thirteen cheefes for the tythes of these lands in *Sapstow*; and that in recompence thereof the parson of *Sapstow* had thirteen cheefes for the tythes of such lands in *Hemington*; and upon this matter he grounded his prohibition, alledging, that he had pleaded this in the spiritual court, and it would not be received.—*TANFIELD* moved, that the prohibition lieth not; for it is for one that is not sued, and it is not reason he should stay the suit of a stranger. Also here the very right of tythes is to come in question, and not the bounds of the parish, and so is not triable here, as 35. Hen. 6. pl. 39. & 47. & 14. Hen. 4. pl. 17. are.—*COKE contra.* For the right of tythes is not here in question; but a *modus decimandi*, and so is triable here; and this was a good matter for the parishioner to plead, and that which the parishioner may plead; he that cometh in *pro interesse* may plead.—*GAWDY.* The parishioner might well plead it; but when the parson of another parish will plead it, by this the right of tythes will come in question between the two parsons. 20. Hen. 6.

If a vicar sues
a parishioner for
tythes in the
spiritual court,
and the parson
appropriate ap-
pears there *pro*
interesse suo, and
the Court will
not receive his
plea of a *modus*,
a prohibition
shall be granted.
Ante, 71.

2. Ro. Ab. 312.
Keilw. 110.
Moor, 915.
Dougl. 378.
Cowp. 414.

DULLINGHAM
against
KYFFLEY.

pl. 18. the case is, That when the right of tithes is in question between two parsons, this Court hath no jurisdiction: for the trial of the right, &c. belongs to the civil law. 31. Hen. 6.—And afterwards THE COURT was of opinion to grant a consultation. *Sed adjournatur.*

CASE 19.

The assent to
the 39 Articles
must be un-
feigned.

4. Inst. 324.
3. Lev. 101.

Smith against Clerke.

PROHIBITION. The case upon special verdict was, Two incumbents were of the church of *Ungery Hatly* in the county of *Cambridge*. One sued the other in the spiritual court to deprive him for not reading the Articles, and giving his assent to them according to the 13. *Eliz.* c. 12. The issue being, If he gave his assent? the jury found, that he read the Articles, and said, "I give my consent unto them so far forth as they agree with the word of God."—And it was adjudged, that it was not such unfeigned consent as the statute intendeth; but it ought to be absolute without condition. And a consultation was awarded.

CASE 20.

A copyhold is
not destroyed by
severance of
the inheritance
of the copyhold
from the manor.
Ante, 103.
Post, 499.

S. C. 4. Co. 24. b.
S. Co. 64.
See Gilb. Ten.
209.
4. Co. 21.
Cro. Jac. 573.

Murrel against Smith.

EJECTIONE FIRMÆ. *Vide* 4. Co. 24. b.—THE COURT held, that he remained a copyholder, as before, and the heir might enter without admittance, yet should pay his usual fine, and do all his services, except suit at court; for that is gone by severance from the manor, and should be subject to forfeitures, as waste, &c.—And FENNER, *Justice*, said, that he might surrender his estate to the grantee of the freehold, to the use of the grantee, for he had the reversion, but could not surrender to the grantee to the use of another, nor the grantee cannot grant it by copy to another; so the copyholder must always keep it in his hand. But *quære* of this. And the OTHER JUSTICES gave no opinion of this point.

2. Com. Dig. 486. 1. Bac. Abr. 481. 2. Term Rep. 415.

CASE 21.

A devise that
"if his wife
educate his
children," the
shall have the
land till they
come of age,
gives her an in-
terest which does
not determine
by her death.
Post, 678.
Ante, 190.

Carter, 25.
Godol. 349.
Lane, 26.
Fob. 285.

Smith against Havens.

TRESPASS. Upon demurrer the case was, *I. Smith* by his will in writing devised, that "If *Elizabeth* his wife think good to bring up his children in learning, and to find them meat, drink, and apparel, that then she shall have his land till *I. Smith* his son attain his age of twenty-four years;" and dieth. The wife undertaketh the bringing up of the children, and dieth before the son came to twenty-four years of age. The question was, If this was only a matter of confidence, or of an interest also in the land?—And all THE JUSTICES were of opinion, that it was not only a confidence but an interest, and it was tied with the condition to bring up the children; and if it should determine, the children should be without remedy for their education. 4. *Eliz.* *Dyer*, 210. *Et adjournatur.*

2. Leon. 211. 221. *Dyer*, 210. Gilb. Dev. 72. Abr. Eq. 195. Gilb. Eq. Rep. 36. Bac. Ab. 410. Powel on Dev. 301, 302.

CASE 22.

If tenant for
life and he in
remainder in
tail join in a
lease to A. for
life, remainder
to B. for life;
and the issue in
tail accepts the
rent of A. and
levies a fine;
the lease in remainder
is good, notwithstanding
the scoffment. Ante, 56. 154.

Jeffery against Coyte.

EJECTIONE FIRMÆ. The case upon special verdict was, *Avice Trevelian* being tenant for life, the remainder to *Thomas* her son in tail, they two, 2. & 3. *Ph. & Mary*, let the land by indenture to *Agnes Browne* for life, remainder to *W. Browne* for life, rendering ten pounds rent per annum. *Avice* dieth. *Thomas*, that was in remainder, accepts the rent of *Agnes Browne*, and dieth. *Hugh* and the issue in tail accepts the rent of A. and levies a fine; the lease in remainder is good, notwithstanding the scoffment. Ante, 56. 154.

Trevelian, the issue of *Thomas*, accepts the rent of the said *Agnes Browne*, and after enters and makes a feoffment, and levieth a fine to *J. S. Agnes Browne* re-enters, and dieth; *W. Browne* as in his remainder enters. The question was, If *I. S.* the purchafor might avoid this lease in remainder; or if the acceptance of the rent from the first tenant for life, made this lease good to *W. Browne* in the remainder?—*GAWDY*. This acceptance of the rent by the issue in tail, maketh good both the estate for life, and the remainder to *W. Browne*, for they make but one estate; and if a lease be made to two, and the issue in tail accepts the rent of one of them, and saith he will accept him only for his tenant, yet it is good for both; and these estates are directed out of both the interests of *Avice* and *Thomas* their son, for they shall join in an action of waste. 27. Hen. 8. fo. 17. *Eliz. Dyer*, 339. if tenant for life and he in the remainder join in a lease for life, it is a forfeiture; for the lease is derived out of both their estates, and if it inured by way of confirmation, it could be no forfeiture; and here when *Avice* the tenant for life is dead, the estate shall be said to be created only by him in the remainder.—And all THE JUSTICES agreed, if it were only the confirmation of *Thomas*, then the acceptance of the rent by his issue should not make the estate in the remainder good.—*WRAY* and *FENNER* held the lease is derived out of both their interests; and if any can avoid it, it must be the issue in tail.—*CLENCH* doubted; for he conceived that the estate was only created by the tenant for life, and so had granted a reversion; and so the acceptance by the issue should not bind him.—But it was afterwards adjudged that the estate in remainder was good, and would not be avoided by a purchafor.

JEFFREY
against
COYTE.

Co. Lit. 251. b.
Hob. 333.
2. Roll. Rep. 492.
Cro Jac. 689.
1. Sid. 62.
4. Mod. 6.
3. Com. Dig. 234.
Cowp. 482.
Dougl. 53.

Stone against Radish.

Trinity Term, 33. Eliz. Roll 762.

DEBT upon an obligation. The condition was for the delivery of twenty quarters of wheat. The defendant pleaded, that *pendente billâ* the plaintiff had accepted fifteen quarters, and demands judgment of the bill.—And it was adjudged no plea, for it is collateral, and not parcel of the sum contained in the obligation; and if it be a plea, it is a plea in bar, and not in abatement. And it was adjudged for the plaintiff.

The acceptance of a lesser sum *pendente billâ* cannot be pleaded in abatement to debt on bond. *Qu. If in bar?* Antc. 202. Post. 260. 342.

CASE 23.

Action against Hill.

Trinity Term, 33. Eliz. Roll 393.

DEBT upon an obligation. The condition was, That whereas the defendant was made sub-collector of the subsidy by the plaintiff, if he gave a sufficient account in the exchequer of all sums which he received, and if he discharged or saveth harmless the plaintiff of these receipts against the queen, and procureth to the plaintiff a sufficient acquittance or discharge out of the exchequer, as in the like case is used, that then, &c. The defendant pleads, that he had accounted, &c. and had discharged and saved harmless the plaintiff, &c. and had procured him an acquittance, &c. Hereupon it was demurred.—*WILD* moved for the plaintiff, that the plea was not good; for he pleads in the affirmative, that he had discharged, &c. and shewed not how, &c. 35. Hen. 6. pl. 21. 40. *Edw. 3. pl. 20.*—*GAWDY*. If the discharge is to a particular thing, he must shew how, &c. but otherwise it is when it is to a multiplicity of things, for then a general pleading is good, 5. *Edw. 4. pl. 8.* and so peradventure it is here.—*E: adjournatur.*

Performance generally, without shewing how, may be pleaded to an affirmative covenant, if it contain multiplicity. Antc. 232. Post. 393. 477. 749. 916.

CASE 24.

2. Co. 4. a. Plowd. 7. Moor. 857. 1. Saund. 127. Cowp. 578.

CASE 25.

Clerke against Hopkins.

Hilary Term, 32. Eliz. Roll 238.

An infant executor, of the age of thirteen, or other person by his order, may sell goods to pay debts.

Ante, 43.

5. Co. 27. b.

Went. 213.

Godol. 103.

1. Roll. Ab. 730.

3. Leon. 143.

Keilw. 51.

2. Chanc. Caf.

257.

2. Term Rep.

597.

ASSUMPSIT against the defendant, as executor to *Simons*. He pleaded, that he is not executor, and that he never administered, &c. The plaintiff replieth, that at *D.* in the county of *B.* he administered goods to the value of, &c. And upon this they were at issue. The jury find a special verdict, that the said *S.* made his wife executrix, and died. The wife proveth the will and administers, and makes *J. S.* her son, of the age of thirteen years, executor, and the defendant overseer, and dieth. The infant proveth the will; the defendant, by the consent of the infant, selleth certain goods, to the value of one hundred and forty pounds, to the use of the infant; and, If this were administration? they pray the discretion of the Court.

TREDWAY moved for the plaintiff, that this is an administration; for although an infant may be an executor, yet he must do things as an executor: but it is not found that the goods were sold in execution of the will; for then it would not be an administration in the defendant, 1. *Eliz. Dyer*, 166. 9. *Eliz. Dyer*, 255. and an infant of the age of thirteen years cannot give his assent to the sale of the goods.

CURIA contra. For an infant executor is to pay debts, and then he must sell goods to pay them; for peradventure the creditors will not stay, nor take goods for their debts; and therefore the sale by the infant himself is good: so is the sale by another, by his consent; and when it is no prejudice to the infant, it is without doubt good; and here he doing it as a servant to the infant, it is no administration.—And it was adjudged that the plaintiff should be barred.

CASE 26.

Laund against Tucker.

On a fine by tenant for life, the reversioner shall have five years after his death to make claim.

Ante, 220.

3. Co. 78. b.

Cruise, 215.

2. Bac. Ab. 534.

EJECTIONE FIRMÆ. It was found by a special verdict, that tenant for life and *J. S.* joined in a fine *sur consif. de droit come ceo*, &c. to a stranger, who rendered to *J. S.* for eighty years, remainder to the tenant for life in fee. Proclamations pass, and the five years pass without entry by him in the reversion; tenant for life dieth; the question was, If he in the reversion should have other five years?—And it was adjudged he should: and so it was adjudged in *Some's Case*, 7. *Eliz.*

Hogg against Cross.

Hilary Term, 33. Eliz. Roll 685.

A feoffment to *A. habendum* after the death of the feoffor in tail with livery *fec. for. charta* is void.

Ante, 29.

Post. 269. 585.

2. Ro. Ab. 1066.

3. Lev. 339.

Dyer, 272.

Hob. 171.

Plowd. 147. 160.

2. Co. 24. 55.

2. Co. 154.

Cro. Jac. 376.

Co. Lit. 48. b.

2. Bac. Ab. 496. 498.

1. Wood's Con. 237. 245. 248.

Gillb. Ten. 260.

EJECTIONE FIRMÆ of a house and garden in *London*, of the lease of one *Rice*. It was found by special verdict, that *J. Warren* was thereof seised in fee, and held it in burgage, and by his will devised it to *Margaret* his wife for life; and dieth. *Margaret* taketh *Rice* to husband, who made the lease. But they further found, that the said *J. Warren*, before the making of his will, made a deed of feoffment to *G. Warren* his son, *habendum* after the death of the said *J. Warren*, the feoffor, to the said *G. Warren* in tail; and made livery of seisin *secundum formam chartæ*: and, If anything passeth by this? they prayed, &c.

G. WRAY, of *Lincoln's-Inn*, argued for the plaintiff, that this feoffment was void, and nothing passed, and then the will made afterwards was good; for when no estate is expressed

Cro. Jac. 376. Co. Lit. 48. b. 2. Bac. Ab. 496. 498. 1. Wood's Con. 237. 245. 248.

Gillb. Ten. 260. Cowp. 9.

in the beginning of a deed, but only an implied estate for life, as here, and by the *habendum* an express estate is limited, this doth controul the implied limitation; and if this be void and repugnant in law, as it is here, being after the death of the feoffor, all is void: but if there be an express limitation in the beginning, if the *habendum* be repugnant, it is void, and the first is good; and although livery be made, yet it is tied *secundum formam chartae*, which is void, and so all is void; for it is but the execution of a void deed. And this very point was ruled accordingly in *Mayn's Case*, in the court of wards.—DALTON *contra*. That an estate for life doth pass by the premises, and the *habendum* void.—But all THE JUSTICES resolved the contrary; for it appeareth to be the intent of the feoffor, that no estate shall pass but *in futuro*, viz. after his death, which is against law; and it being all the purport of the deed, nothing shall pass in any other manner; for nothing shall pass by the premises but according to his intent, which is nothing; for he intended not to pass the freehold immediately. But if one grant a term by deed, *habendum* after his death, this doth pass by the premises; for the premises are sufficient to carry it, and the *habendum* shall not utterly destroy it: but it is otherwise here, where it is to take effect by limitation of the party, which is void, and the livery is also void to execute a void deed.—And without further argument it was adjudged for the plaintiff.

Emott against Cole.

Easter Term, 33. Eliz. Roll 337.

DEBT upon an obligation made ult' March, 29. Eliz. The condition was, to perform all covenants, conditions, articles, agreements and clauses in an indenture bearing the same date. The defendant pleads the indenture, which was a lease for years of certain lands and stock of cattle to the defendant and to *Tolfry*, rendering twenty pounds rent *per annum*, and all the covenants and other clauses in it were concerning the land; and pleads, that long time before the lessor had any thing in it, one *C.* was seised of the land in fee, and acknowledged a statute to *J. S.* and that after the lease made, viz. 29. May, 29. Eliz. the consuee sued execution, and all the land was delivered in execution (so they were thereof evicted); and that after the date of the indenture, until execution sued, he and *Tolfry* had performed all the covenants, conditions, agreements and clauses in the said indenture. Upon this plea it was demurred in law.—BUCKLEY, for the plaintiff, took two exceptions to the plea in bar.—First, The condition was, if the defendant and *Tolfry* and their assigns perform, &c. And he pleads, that he and *Tolfry* had performed, &c. but saith not that he and *Tolfry* and their assigns had performed, &c. and it may be they had assigned it over.—Second, The condition was, if they perform all the covenants, conditions, agreements, articles, &c. and when he recited them, he said not which are all the covenants, conditions, agreements and clauses in the indenture, but leaveth out "*articles*," so hath not pleaded performance of the condition.—The matter in law was, If a lease be made of lands and goods rendering rent, if the land be evicted, whether all the rent shall be gone, or there shall be an apportionment in regard of the goods; and so the non-payment of the portion for the rent be a forfeiture of the bond. And he said there shall be an apportionment, 12. Hen. 8. pl. 11. 35. Hen. 8. Dyer, 56.

Hence
against
Cress.

CASE 18.

A lessee who is evicted in consequence of a statute acknowledged by a former owner of the estate, cannot be sued by his lessor for an apportionment of the rent, on an indenture to perform covenants, &c. and a plea of a performance need only answer the indenture substantially, and be a common intent.

Cowp. 143.

EMOTT
against
COLL:

Post. 607.

if the goods be evicted there shall be an apportionment; and so *converso*.—CURIA contra in omnibus. First exception is not material, for it appeareth not there is any assignee, and it shall not be intended except it be specially shewn, and a bar is good to a common intent. Second exception, "Agreements" is all one with "articles;" and if many words contain one thing in signification, if he answers to them in substance, it is good. For the matter in law, there shall be no apportionment, for the rent issueth out of the land, and follows it: and so WRAY, Chief Justice, said it hath been heretofore adjudged. And it was here adjudged the plaintiff shall be barred. Vide 4. Eliz. Dyer, 212. & 361. 9. Edw. 4. pl. 1. 21. Edw. 4. pl. 28. & 29.

CASE 29.

No attaint lies
if the jury are
incomplete.
Ante, 222.

Hasset against Payne.

ATTAINTE.—COKE sheweth to the Court, that in the first venire of the petit jury, one George Ellinger was returned; and upon the distringas, Gregory Ellinger was returned, and appeared in the lieu of George Ellinger, and was sworn and tried the matter; so the trial was by eleven, and then no attaint lieth.—And of this opinion was THE WHOLE COURT: and for this cause the attaint was stayed.

CASE 30.

A bill "to be
paid as I pay
my other cre-
ditors" must
be declared up-
on specially.

Cro. Jac. 316.

Bright against Metcalfe.

DEBT upon a bill of five pounds, which had these words, "to be paid as I pay my other creditors." The plaintiff declared generally, that he was indebted to him in five pounds, *solvendum* upon request. The defendant demanded oyer of the bill; and it was entered in *hæc verba*, and pleads an insufficient matter. Upon which it was demurred; and this exception was to the declaration for variance from the bill; for he ought to declare specially according to the bill.—And of this opinion was THE WHOLE COURT, except FENNER, who was of opinion, that the words "to be paid as he paid his other creditors" were void, and it is payable immediately upon request; as 4. Edw. 4. *solvend'* to a stranger is void. But the others held *à contra*: and it was adjudged for the defendant.

CASE 31.

Pendred against Chambers.

Hilary Term, 33. Eliz. Roll 24.

A replication
must conclude
with a verifica-
tion.

Cowp. 575.

Dougl. 58. 94.

2. Ter. Rep. 439.

ERROR of a judgment given in debt in the court of piepowders in Canterbury. The error assigned was, That the plaintiff in his replication hath not averred his plea, nor in the end of it demanded his debt and damages.—And for these causes the judgment was reversed (a) by CLENCH and FENNER (WRAY and GAWDY *absentibus*).

(a) Sed vide 4. & 5. Ann. c. 16. this error must be shewn for cause of demurrer.

A court of piepowders may, by *mereatu* or *feriâ*; but this is to be by prescription, and the prescription must be in the stile of the court. held out of a market or fair. 1. Lev. 273. 1. Saund. 98. Cro. Jac. 313.

CASE 32.

Morris against Thomas.

Hilary Term, 33. Eliz. Roll 92.

The 31. Hen. 3.
c. 30. extends
judgments given
in the grand sessions in Wales.

ERROR of a judgment in Anglesey in *ejectione firmæ*. And the error assigned was, That the venire facias was, *quorum quilibet habeat*

debeat four pounds; whereas the 27. *Eliz.* c. 6. extends not to *Wales*; for it is only of the courts of *Westminster*, and the assises. To which it was answered, that this is no fault at common law; for it is for the benefit of the parties to have the better trial; and if it be, it is helped by the statute of *jeofails*, 32. *Hen.* 8. c. 30. for that extends to all courts of record; and this judgment was at the grand sessions there in *ejectione firmæ*.—And of this opinion was THE COURT, and affirmed the judgment.

MORRIS
against
THOMAS.

Calthorp against Woodward.

CASE 33.

Trinity Term, 32. *Eliz.* Roll 1115.

ERROR of a judgment in debt. The error assigned was, that the *venire facias* was awarded upon the roll, *Trin.* 28. *Eliz.* returnable *Mich.* 28. & 29. *Eliz.* and the trial was, by *nisi prius*, roll. 4. *July*, before the return of it; which is a calling of the jury without warrant.—THE COURT held, that if the *venire facias* hath an ill *teste* or an ill return, or is wanting, this is aided by the statute after verdict; but here it is not wanting, but the jury is taken before the return of it, and so without warrant: and for this cause it is ill, and not helped by the statute.

Venire facias
improperly
awarded on the
roll.
Post. 259.

Savery against Tey.

CASE 34.

Easter Term, 33. *Eliz.* Roll 102.

ERROR upon a judgment in debt in *Norwich*, upon the 33. *Hen.* 8. c. 9. for buying of titles.—First error. The defendant pleads not guilty, which is no plea in this action.—But all THE COURT held it good, when the action is grounded upon a penal statute.

Not guilty is a
good issue to
debt on a penal
statute, but if
the verdict be
for less than the
demand, and no
judgment for
the residue, it is
bad. In actions
ad damnum it is
otherwise.
Post. 621. 756.
699.

SECOND ERROR. The plaintiff demands 50*l.* for the value of the land, and the jury find the value 20*l.* upon which the plaintiff had judgment to recover one moiety, and the queen the other moiety; and no judgment was for the residue of the 50*l.* viz. that the plaintiff *sit in misericordia pro falso clamore suo*.—For this cause the judgment was reversed; but in trespass or other actions, wherein the plaintiff declares *ad damnum*, if less be found than he declares, the plaintiff shall not be amerced; because the action is grounded upon an uncertainty.

1. Roll. 217. Dyer, 75. a. Cro. Car. 453. 3. Mod. 324. 1. Sid. 232. Skin. 280. 5. Com. Dig. 177.
2. Bac. Ab. 511. 1. Term Rep. B. R. 467.

Co. 8. 61. a.

Griffin against Bover.

CASE 35.

ERROR to reverse an outlawry upon judgment. The error was, That the *original* was GRIFFIN, and the *capias* GIFFIN.—And for this cause it was reversed.

Outlawry reversed
for variance.
Ante, 50 85. 104.

Haselip against Chaplen.

CASE 36.

Easter Term, 33. *Eliz.* Roll 292.

ERROR upon a judgment in the common pleas in replevin, where the defendant avowed for an *esfray*. Error assigned was, For that the defendant had return awarded to him with costs and damages, whereas no costs or damages are given in this case, neither by the 7. *Hen.* 8. c. 4. or 21. *Hen.* 8. c. 19. for they are only in avowries for rent, services, customs, and damage-feasant, so this is out of the statutes. But it was answered, the statutes are to be expounded, that the avowant shall have costs and damages as

Quare, If an
avowant shall
have costs and
damages for an
esfray.

1. Bl. Rep. 95.
2. Com. Dig. 548.
1. Bac. Ab. 522.
1. Burr. 406.
Doug. 709.
2. Ter. Rep. 335.

HASELIP
against
CHAPLEN.

well in other cases, as in those recited; for they are recited only by way of example.—But THE COURT doubted, for damages are penal, and shall not be taken by equity; and they conceived it error, but would advise (a).

(a) See this case moved again, post. 329. when the judgment was reversed.

CASE 37.

Ramsey against Bird senior and Bird junior.

A clerical mis-
pison on the
roll may be
amended after
verdict by an
original paper.

Ed. Rep. 278.
Hetley, 142.
Latch. 165.
Roll. Abr. 207.
Cro. Jac. 165.
2. Leon. 120.
2. Mod. 316.
21. Mod. 684.
Strange, 139.
734. 947.
Ld. Ray. 1441.
Doug. 135.
1. Ter. Rep. 783.

ASSUMPSIT. After verdict for the plaintiff, it was alledged in arrest of judgment, that the declaration upon the file suppo-
seth the promise to be made by *Bird senior* only; but the roll, and the record of *nisi prius*, and all the proceedings afterwards were well laid to be by both; and by examination it appeared, that the paper-copy under the hand of the counsellor (which is the first thing that is put into court) was, that the promise was made by both. And the question was, If it might be amended? And it was strongly urged that it ought not; for the file is as the original, and is the warrant of the roll, and of all the proceedings; so that if the roll be ill, it may be amended by the file; but the file is not to be amended. And it was said, it was so adjudged in this court, *Trin. 31. Eliz. Rot. 774. in Greenway v. Elmes. Co. 8. 159. a. 161. b.*

But all THE COURT (except FENNER) held the contrary, that it might be well amended; for as BRIAN saith, 10. *Hen. 7. pl. 25.* papers are now as records; so that when it appeareth that the paper declaration is good that the promise was by both, it is the fault of the clerk to enter it upon the file to be by one: and so it was adjudged to be amended, and the plaintiff had judgment to recover.

CASE 38.

Denner against Shacroft.

Variance
amended.
Ante, 57. 222.
Doug. 194.
1. Ter. Rep. 238.

ACTION SUR TROVER. In the *disfringas jurat* the defendant was named *Shacroft*, but in the *venire facias* and all the other proceedings he was truly named: and this *mis-nomer* was alledged in arrest of judgment.—WRAY. The difference here is little, and in some countries *a* is sounded for *o*, and so is not material: and it was awarded to be amended, and the plaintiff had judgment.

Cotton's Case.

CASE 39.

Variances be-
tween the *venire*
facias and the
disfringas may
be amended.
Ante, 222.

ACTION for words. In the *venire facias* a juror was returned by the name of *J. S. of Abbotsan*, and in the *disfringas* he was returned by the name of *J. S. of Abbatsan*: and it was awarded to be amended.—So in this term between *Mortimer and Oger*, a juror in the *venire facias* was named *De Huf*; and in the *disfringas De Hurst*. And this was alledged in arrest of judgment, and awarded good; and the plaintiff had judgment.

CASE 40.

Cottingham against Griffith and Snow, Sheriffs of Bristol.

If both the
venire and the
disfringas are
wrong the error
cannot be
amended.
Fest. 622.
2. Cr. 278.

DEBT upon an escape. The issue was *nihil debent*. The *venire facias* and *disfringas* was, "*quandam juratam in placito transgressis*;" and this after verdict was alledged in arrest of judgment.—And for this cause the judgment was stayed; for it is not aided by the statute of *jeofails*: but if the *venire facias* or *disfringas* had been right, it had been otherwise.

Gurney

Gurney and K. Uxor against Sir Ed. Clere.

CASE 41.

Trinity Term, 33. Eliz. Roll

If a grant of rent be pleaded without attornment, or a surrender without an agreement, to it, or a devise without assent, and an issue on the grant, surrender or devise be found for the defendant, the mis-joining is aided by 32. Hen. 8. c. 30. and the *ven. fac.* shall be where the grant, &c. is supposed to be made.

Post. 565.
Co. 7. 2. 2.
Ant. 116.

Ant. 228.
Post. 455.
3. Bac. Ab. 97.
Ld. Raym. 90.
B. R. H. 120.

CASE 42.

The want of *ven. fac.* and pannel helped by the verdict.
Ant 215. 257.
3. Bac. Abr. 275.

CASE 43.

A defendant shall not be allowed an advantage from the defect of his own plea. Ant. 235. 5. Co. 43. 2. Moor, 692.
had

DEBT upon an obligation made to one *P.* and to the said *K. dum sola fuit*. After verdict it was moved in arrest of judgment, that the defendant did plead, that whereas the condition of the obligation was, that whereas he had by his deed bearing date at *B. &c.* granted a rent of forty marks *per annum* to the said *P.* and *K.* for their lives, payable at two feasts, &c. if he accordingly paid the rent, that then, &c.; and alledgeth, that he always paid it to the said *P.* and *K.* during the life of *P.* and to *K.* after his death, until the 24. January last past; at which day *G.* the plaintiff, having intermarried with the said *K.* granted the rent to *J. S. &c.* and issue was taken upon it, *quod non concessit*, and found against the defendant.—And this was alledged to be no issue; for a grant of a rent is pleaded, but no attornment alledged (*a*), then the grant is void, and an issue cannot be taken of that which is not; and *Warner's Case* was cited to be adjudged in this court, when in an avowry the defendant prescribed to have common to one hundred acres of land, the plaintiff traversed, that he had not common to one hundred acres of pasture. And upon this issue was joined; and after verdict, it was adjudged to be no issue.—Second exception. The *venire facias* was of a wrong village; for the grant is supposed to be made at *B.* of a rent issuing out of the manor of *B.* and the *venire facias* was of *B.* where it ought to be of the manor of *B.* *Sed non allocatur*; for the issue being upon the grant, the *venire facias* shall be of the place where the grant is supposed to be made.—Third exception. The jury assessed damages to *baron* and *feme, ratione detentionis debiti*, where it ought to be only to the *baron*. *Sed non allocatur*; for the damages shall be to both.—But THE COURT doubted of the first exception. And it being moved again, GAWDY said it is aided by the statute of *jeofails*, for it is an insufficient pleading: as if a man pleads a surrender, and pleadeth not an agreement, this is insufficient; but if issue be taken upon the surrender, and the verdict find it, it is helped: so to plead a devise of a term, and sheweth not the entry by assent of the executor, yet if issue be taken upon the devise, and the jury find it, this is aided by the statute. And it was adjudged for the plaintiff.—And COKE said it was adjudged in *Panier's Case* in this court, where one pleaded a concord, but pleads not satisfaction; and issue is joined, and verdict against the defendant; and it was adjudged good, and aided by the statute.

(a) Rendered unnecessary by 4. Ann. c. 16. s. 9. Dougl. 282.

Welsh against Upton.

TRESPASS. It was moved in arrest of judgment after verdict, that the *venire facias* and the pannel were wanting; but the *distingas jurat* and the pannel annexed to it remained.—And this was adjudged to be helped by the statute,

Cro. Car. 338. Bull. N. P. 320. Salk. 47. 3. Bac. Abr. 275.

Andrews against Kirke.

DEBT ON A BOND. The condition was to deliver fifty quarters of wheat. The defendant pleaded in bar, that he had an advantage from the defect of his own plea. Ant. 235. 5. Co. 43. 2. Moor, 692.
had

ANDREWS
against
KIRKE.

had delivered thirty quarters of wheat pending the bill, which the plaintiff had accepted, but shewed no deed, &c. Upon this issue was taken, that he had not accepted, &c. and found for the plaintiff. It was moved that it was no plea, so no issue.—But it was resolved, that it was helped by the statute; and the plaintiff had judgment.

CASE 45.

Wood against Butts.

If the defendant plead a surrender to the plaintiff's steward, the plaintiff ought to traverse the surrender, not that the person receiving it was not his steward.

EJECTIONE FIRMÆ. The defendant pleaded a surrender of a copyhold by the hand of *Fosset*, then steward of the manor. Issue was joined, *ABSQUE HOC* that he was steward.—All THE COURT held this no issue: for the traverse ought to be general, that he did not surrender; for if he were not steward, the surrender is void; so of a surrender pleaded into the hand of the tenants of the manor. And it was held by THE COURT, that where issue is taken upon a surrender, it shall be tried where it was alledged to be done, and not where the manor is, of which the copyhold is holden; and in the principal case, a repleader was awarded,

Moor, 539. 574.

6. Co. 24. Cro. Car. 61. 105. 586. Vaugh. 10. 56. Lut. 1630.

CASE 46.

Braddish against Bishop.

A fact alledged in a hundred or a ward only is bad; it must be the county; and the parish, hamlet, or place within the same.

ASSUMPSIT. The plaintiff shewed, that whereas the defendant at London, in warda de Cheap, was obliged to 7. S. the defendant, in consideration that the plaintiff would give, &c. at London, in warda prædicta, super se assumpsit. Upon non assumpsit pleaded, the venue was de parochia de Arcubus in warda de Cheap; whereas there was no parish mentioned before in the count. And this matter was alledged in arrest of judgment, and exception taken to the count, that the promise was laid in a ward, and not in a parish within the ward, as it ought to be, 7. Hen. 6. pi. 36. Wards in London are as hundreds in the country, and the parish as the town; and as an act cannot be laid to be done in the hundred, so it cannot be in a ward.—WRAY, Chief Justice. An assumpsit or other matter is used to be laid in a parish; and it hath been ruled, if the trial be in another parish, it is ill.—GAWDY, Justice, agreed, 7. Hen. 4. pl. 13. a venire facias may be of a town, parish, manor, or other place known, but not of a city, county, or ward: and this is not helped by the statute of 18. Eliz. c. 14. And so was the opinion of THE WHOLE COURT, and that the plaintiff cannot have a venire facias de novo, but must begin again; for the fault was in his count, and not by the award of the Court only (a).

Hob. 5.
Cro. Car. 165.
3. Com. Dig. 30.

(a) But now the 21. Jac. 1. c. 13. gives aid after verdict where the *visne* is awarded out of too many, or too few places in the county named. The 16. & 17. Car. 2. c. 8. goes further, and cures the *visne* wholly if the cause was tried by a jury of the proper county. And the 4. & 5. of Ann. c. 16. in civil suits, and 24. Geo. 2. c. 18. in penal actions, direct that every *venire facias* shall be awarded from the body of the county in which the action is triable.—See Harg. Co. Lit. 125. a. n. [2].

CASE 47.

Horseman against Johnson.

On an issue whether the manor of A. is holden of the honor of B. the *venire* must be from both manors. Post. 463. 3. Bac. Abr. 274.

TRESPASS. The issue was, if the manors of *Perton* and *Great Hasely* were holden of the honor of *Ewelme*; and the *venire facias* was of one manor only.—And for this cause it was ruled to be ill; and the plaintiff taketh a *venire facias de novo* of both the manors, and the issue was tried for him.—COKE and TANFIELD

alledged

alleged in arrest of judgment, that the *venire facias* was not well awarded, but that judgment ought to be given, *quod querens nihil capiat per billam*; for it is a mis-trial, and a *venire facias de novo* was not to be awarded, but for the same jury, or where the verdict is not well examined; and the first verdict is here entered, and the writ filed; so there shall be two verdicts of record for the same thing, and both full. But it being moved again, THE COURT held it to be good, and the plaintiff had judgment,

HORSEMAN
against
JOHNSON,

Ford against Brooke.

CASE 43.

ACTION for calling him a "perjured person," at *D. in Essex*. The defendant justified, for that the plaintiff was perjured in his answer in chancery at *Westminster*, in the county of *Middlesex*, and so justifieth the words at *D.* The plaintiff replied, *de injuriâ suâ propriâ*.—The *venire facias* by the award of the Court was directed to the sheriffs of *Middlesex*; for the justification ariseth there, and the words were confessed,

In justification of words the *venire* shall be where the justification arises.
Post. 468.

1. Vern. 23.
1. Saund. 246.

The Queen against Harris.

CASE 49.

INFORMATION upon the 5. *Edw. 6. c. 7.* for buying of wools contrary to that statute. The defendant pleaded as to all, except fifty stone of wool, not guilty; and as to the fifty stone he pleads, that there is an information depending against him for it in the common pleas, at the suit of *Lewis*; and avers, that they are for the same offence; and demands judgment, if as to them he shall be put to answer. And upon this it was demurred in law.

Another information for the same offence depending, may be pleaded in abatement to an information *qui sam.*
Post. 325.

It was argued by GODFREY and ATKINSON for the queen, that it is no plea; for it is not alleged, that any writ or process is sued out upon the information, and then it cannot be said to be depending, 7. *Hen. 6. pl. 6.* 10. *Edw. 4. pl. 13.*—Secondly, The information here supposeth the buying of the wool to be the 20. *Nov. 31. Eliz.* and the selling to be 6. *May*, the same year; and the information in the common pleas supposeth the selling to be the 6. *July, 31. Eliz.* so cannot be intended the same offence: and although the defendant hath averred it to the Court to be for the same offence, yet the averment is not material, when it appeareth to the Court it cannot be so, being at several days,

1. Roll. Rep. 49.
2. Hawk. c. 26, f. 63. Sed vide Ch. 34. f. 1.
Roll. Rep. 49, 134.
Hob. 138. 209, Salk. 89.

But all THE COURT, except GAWDY, held the plea good. For they said, that immediately when the information is brought into court, it is entered upon record: and this containeth all the substance of the matter, and in this point is not like other writs; and therefore shall be said to be immediately depending, although no writ or process is sued upon it: and this appeareth by the express words of the statute of 18. *Eliz. c. 14.*—Secondly, It is a good plea with an averment; for otherwise, by the false supposal of the day, when the offence is committed, the defendant shall be put to double trouble. But GAWDY doubted of these matters.—Yet at another day, it being again moved, the plea was adjudged sufficient; and it was adjudged for the defendant,

Cro. Jac. 4
Dougl. 2
3. Burr.

CASE 50.

Rockwood against Fearar.

A plea which confesses and avoids the plaintiff's title is good, though the matter may be given in evidence on the general issue. See *vide* Latch. 185. Ant. 146. Post. 555.

3. Lev. 41.
1. Salk. 374.
2. Salk. 654.

ACTION of trover in *London*. The defendant pleaded, that long time before the conversion supposed to be, *J. S.* was possessed of these goods, as of his own goods, at *B.* in *Norfolk*; and that he before the conversion supposed did casually lose them, and they came to the hand of *J. Palmer* by trover, who gave them to the plaintiff, who lost them in *London*; and the defendant found them, and afterward did convert them to his own use, by the command of the said *J. S.* as it was lawful for him to do. It was moved, that this is no plea, for it amounts to the general issue.—But all THE JUSTICES held it a good plea; for it confesseth the possession and property in the plaintiff, against all but the lawful owner.—**NOTA.** This plea was devised by COKE to alter the trial.

CASE 51.

Wood against Hamstead.

To trespass on a distress for rent, a plea that it was behind by the space, instead of *after* a space, of many days, is bad. Ante, 88.

1. *Ld. Ray.* 218.
Dougl. 463. 434.

TRESPASS for taking the cattle of the plaintiff. The defendant pleaded, that he was seised of the land in which, &c. and let it to *A.* rendering rent at the feast of *Easter*; and if it be arrear at the said feast and ten days after, that he might re-enter; and saith, at the feast of *Easter*, in the year of, &c. the rent was behind, and by the space of ten days after; and thereupon he re-entered and distrained the cattle, damage-feasant. And upon this it was demurred.—First, That he saith he let to *A.* but saith not *virtute cujus* he entered and was possessed; for it may be the lessor did not waive the possession, and then no rent is due.—Secondly, That he saith the rent was behind by the space of ten days, where it should be *after* the space of ten days; as in *Browning v. Besson*, *Plow. Com. f. 3.* there is no mention of the day and year of the lease, but spaces left for them.—For these causes, and principally for the second, it was adjudged for the plaintiff.

CASE 52.

Dr. Hunt's Case.

The spiritual court cannot administer the oath *ex officio*, but where the matter is within their jurisdiction, and the offence has been previously presented. Ante, 201.

2. *Inst.* 657.
Hard. 364.
Cro. Jac. 388.
Hob. 84.
Salk. 550.
Strange, 80. *Barnes*, 45. 5. *Com. Dig.* 480. 3. *Bl. Com.* 101, 447.

HE was indicted, that whereas by the law of the land no person is to be cited into the spiritual court to take any oath, but in cases of matrimony and testamentary; that he, being commissary of the archdeacon of *Norfolk*, had caused *J. Bodingley* to be summoned to appear before him at a place, &c. to compel him to take an oath concerning incontinency, which touched himself, against his will (*a*).—**WRAY.** This cause was referred to the Lord ANDERSON, and the Lord Chief Baron, and to myself, to certify if the ministring of this oath be against the law. And we certified in this manner: Where the knowledge of the matter did belong to the court christian, they may proceed according to the civil law.—**GAWDY.** The oath cannot be ministred to the party, but where the offence is presented first by two men, *quod fuit concessum*; and it was said, it was so in this case.

(a) See 13. Car. 2. c. 12. by which the oath *ex officio* is abolished.

33. and 34. Eliz. In the Common Pleas.

Sir Edmund Anderfon, *Knt. Chief Justice.*

Sir William Periam, *Knt.*

Hugh Wyndham, *Esq.*

} *Justices.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

Elmer et Uxor against Thacker.

CASE 1.

QUOD EI DEFORCEAT of lands, of which the wife was tenant in dower The defendant pleaded a recovery against the wife, *dum sola fuit*, in a writ of waste by *nihil dicit*; and that he released the damages, and had judgment to recover the land. The demandants replied *null waste fait*, and so would avoid the recovery; and thereupon the tenant demurred.—After argument by the serjants, all THE JUSTICES delivered their opinions, that this writ lieth not upon a recovery by *nihil dicit*; for the statute (a) doth not give this writ but upon a recovery by default, which is intended before appearance; but this is upon a *nihil dicit*, which is no default, but as a departure in contempt of court, or rather a confession of the action, and a not denying of the waste; for in this case the waste is confessed, and no writ shall be awarded to enquire of the waste, but only of the damages. This judgment is *quasi* by her own assent, for that she will not plead; and the Court takes it as her acknowledgment, that she hath nothing to plead against it; and the statute that is made only for her benefit, and to relieve her against her default, shall not relieve her against her contempt, or rather her own act. And whereas it was said, that a *nihil dicit* is taken as a default, for a receipt shall be by a termor or *feme-covert* after a *nihil dicit*, as 9. *Edw. 4. pl. 37.* is; and that a receipt shall be by a *feme* after a writ of enquiry of waste, and returned, and the waste inquired, that it is not like to this case; for the statute that giveth receipt is for the benefit of a stranger, that they shall not lose their right by the default or negligence of the party that was to plead; and so a *nihil dicit*, or default, is all one to them. But here this statute is for the relief of the party against whom judgment is given by default, and so are not like. And this is not a judgment by default, but rather a departure in contempt of court, or a *nient dedire*, or *quasi* a confession of the action; which is proved, as PERIAM said, by the cases in *Comment' et Dyer*, that in a debt against the heir, if judgment be upon a *nihil dicit* against him, execution shall be against him of his own land: for in a manner he confesseth that he is chargeable, and hath assets. And ANDERSON and PERIAM held strongly, that if judgment had been given by default in waste, that upon such a recovery a *quod ei deforcean* did lie, especially in this case, when the damages are released; and so the waste is not found by inquest. WYNDHAM *à contrà*, as to this point. But in the principal cause, they all resolved *ut supra*; and it was thereupon adjudged for the defendant. *Vide 15. Ed. 3. "quod ei deforcean."* 9. *Co. Lit. 355. a. b.*

(a) West. 2d. c. 4.

CASE 2.

Sheriffs are intitled to fees for executing judgments given in any courts except those of cities and towns corporate, &c.

Dalt. 527.
Moor, 853.
Latch. 19.
Palmer, 400.
Salk. 331.
Pop. 173.
3. Mod. 97.
3. Cr. 287.
2. Ld. Raym. 1212.
2. Term Rep. 155.

The Sheriffs of Gloucester's Case.

INFORMATION upon the 29. Eliz. c. 4. against them for taking above twelve pence in the pound for executing process upon a judgment in the common pleas. The defendants pleaded the *proviso* in the statute, wherein all cities and corporations and their officers are excepted. Upon which it was demurred. For OWEN, *serjeant*, moved, that this *proviso* extended only for serving of executions upon judgments in their courts, but not upon executions of judgments in other courts; and so it may be collected by the preamble and body of the act.—But all THE COURT *contra*. For it shall be expounded as well for serving executions upon judgments in other courts, as in their own courts. And whereas it was objected, that the county of the city of Gloucester extends four or five miles further than the city, and that this execution was not in the city, but within the county of the city; and so it is not within the *proviso*; THE COURT said, if it had been so pleaded, peradventure it should be otherwise; but as it is pleaded, it appears not to the Court: and thereupon it was adjudged for the defendant.

CASE 3.

Bush against Redgeley.

Upon a bond to save the plaintiff harmless, he is damnified the moment judgment is given; and the defendant cannot avoid the penalty by a subsequent payment of the debt.

Ante, 53.
Post, 369.
5. Co. 24. a.
2. Vent. 36.
Owen, 19.
Cro. Car. 349.
Cro. Jac. 288.
340.
Yelv. 207. 2. Bulst. 94. 105. 2. Term. Rep. 388.

DEBT upon an obligation. The condition was, to save the plaintiff harmless against J. Robinson of one obligation. The defendant pleaded *non damnificatus*. Plaintiff replied, that Robinson had sued him to the *exigent*; and then he appeared, and the said Robinson had judgment to recover against him, upon the obligation *et issint* damnified. The defendant rejoins, that he himself had retained an attorney for the plaintiff on the said suit, and the plaintiff was at no expences, nor was arrested upon it, nor his goods or lands seized; and that after the judgment he was not damnified. Upon this the plaintiff demurred.—And all THE COURT resolved for the plaintiff, for that immediately upon the judgment given, he was damnified; for his body, goods, and land are liable to the execution: and if he afterwards alieneth his land, he cannot by reason of this judgment warrant it to be free of incumbrances; so that by the very judgment he is damnified; and if the defendant after the judgment had paid the debt, it would not serve, for he was damnified before.

CASE 4.

Brewster against Sir Thomas Parrot.

Debt does not lie for rent upon an expired lease.

3. 523.
2. Co. Dig. 637.
3. Bac. Ab. 401.

THE case was, Lessee for life makes a lease for years, rendering rent, and after surrenders to the lessor upon condition. The lessee for years takes a new lease for years of the lessor; the lessee for life performeth the condition, and puts out the lessee for years, who re-enters; and the lessee for life brings debt for the first rent reserved.—And ruled it doth not lie; for the lease out of which it was reserved, is gone and determined.

CASE 5.

Offely against Bat.

Easter Term, 33. Eliz. Roll 403.

Conusee of a fine cannot distrain before attornment.

Post, 351.
Owen, 23.
3. And. 15.

THE case was, Conusee of a fine of a reversion before attornment (a) ousts the lessee, and makes a feoffment. The lessee re-enters, and the feoffee distrains for the rent.—PERIAM and WYNDHAM held, that he could not distrain no more than the feoffor himself before attornment. *Vide Co. 5. 113. a.*

(a) Attornment is now rendered unnecessary by 4. Ann. c.

Scriven *against* Prince.

CASE 6.

FORMEDON of three messuages and certain acres of land. For part of the acres of land they were at issue; and found for the demandant; and as to the residue of the acres the tenant vouched. For the messuages they were at issue upon a *non-tenure* pleaded; and the jury found he was tenant of one of the messuages, and not of the other; but sheweth not of which in certain.—**THE COURT** held, that for the acres, and the house of which the verdict is found, the plaintiff may have judgment; and a writ to the sheriff to deliver seisin; and the plaintiff at his peril is to shew to the sheriff what messuage it was the jury did intend, for the jury is not tied to set bounds to it; and he need not stay for his judgment till the voucher be determined.

Execution of a writ of possession. Post. 465.

Cro Jac. 113, 1. Burr. 139. Dougl. 473.

Michaelmas Term,

38. and 39. Eliz. In the Exchequer.

Sir Roger Manwood, *Knt.* Chief Baron.Edward Flowerdew, *Esq.*Thomas Gent, *Esq.*Matthew Ewens, *Esq.*

} Barons.

The Queen *against* Fairclough.

CASE 7.

INFORMATION in nature of an action of trespass, for taking and cutting certain trees of which the queen was possessed. The case upon special verdict was this: *Andreas de Lowe*, and twelve others were possessed of divers trees by the grant of the owner of the soil; and the said *Andreas* for and in satisfaction of a debt which he did owe to the queen, assigned to her by deed inrolled all the trees. The question was, If the queen should have, by this assignment, all the trees? 8. *Edw. 4. pl. 24.* 19. *Hen. 6. pl. 47.* Comment. 243. & 323.—**COKE** for the defendant did agree, that where the queen came to an entire thing by act in law, as attainder or other act in law, she, by her prerogative, shall have the whole; but where she cometh to have part of the chattel by the grant of a common person, he by his grant shall not prejudice his companion; and therefore in that case the queen shall not have her prerogative. *Quære of this difference.*—**THE BARONS** did not speak to the case, but they said it was strong against the defendant; and they gave him day to take advice, if he could say any other matter.

Prerogative. 3. Leon. 240. Hale on Fitz.

32. 1. Roll. Rep. 7. Litt. Rep. 91. Gouldf. 20. Hardres, 26. 470. T. Ray. 7. 121. 3. Inst. 55.

The

CASE 2.

The Queen against Wall and Green.

Lands of a *conu-*
for extended at
 a certain sum
per ann. by the
 executors of the
conufor, are not
 liable to dis-
 charge a recogni-
 zance by the
 same *conufor*,
 which has come
 to the king by an
 outlawry of
 another *conufor*,
 upon a *scire*
facias against
 the executor of
 the *conufor*, al-
 though it ap-
 pear that the
 lands yield a
 surplus.

2. Com. Dig.
 446. 651.

SCIRE FACIAS. The case was, *J. S.* was bound to *Green* in a statute of 400*l.* and his land extended for this debt, and delivered in execution at the value of 5*l. per annum.* He was also bound in a statute to *J. D.* who assigned it to the queen for his debt; and thereupon an *extendi facias* being awarded, it was found that the land delivered to *Green* in extent was worth 12*l. per annum*; and thereupon a *scire facias* was awarded against them to answer the surplusage of the profits above the said five pounds to the queen. The question was, If it were duly awarded?

MANWOOD and all THE BARONS held it was, for it being found that there was a surplusage above that which would serve a common person, the queen shall have it by her prerogative.

GLANVIL, *serjeant*. I will plead this at all peril.—**CURIA.** And you shall have a short rule.

NOTA. Afterwards all this matter was pleaded upon the *scire facias*; and the case was this: A recognizance of 1000*l.* was acknowledged by *J. S.* to *Comb.* 20. *Eliz.* and afterwards 26. *Eliz.* the said *J. S.* was bound in a recognizance to *Mabb* in 1000*l.* 27. *Eliz.* *Wall* and *Green* executors of *Comb* sued execution of the first recognizance, and the land of the *conufor* was extended at 20*l. per annum.* Afterwards *Mabb* was outlawed, by which the recognizance to him came to the queen; and process of extent issued for the queen, and it was found that the *conufor* had nothing but the land extended by *Wall* and *Green*; and that it was worth (above the twenty pounds it was extended at) 40*l. per annum*; and hereupon *scire facias* was awarded against *Wall* and *Green* to answer the queen for the surplusage above the yearly value that the extent was; and they pleaded their first extent by inquisition; and that they were not yet satisfied. And hereupon it was demurred, which did depend till *Mich.* 38. & 39. *Eliz.* And then it being moved by **KINGSMILL**, *serjeant*,

PERIAM, *Chief Baron*, and **EWENS**, *Puisne Baron*, held clearly, that the queen shall not have any surplusage; for by the extent they had an interest and term in the land, which shall not be divested by the finding of the surplusage afterwards: and the value is not material; for though it be now of so great a value, yet it may be before the time of the extent incurred, it will be of a lesser value; and the *conusee* is to bear the hazard: and the queen hath no such prerogative to divest it from the subject, it being lawfully vested in him, especially this debt accruing to the queen by a common person.—But **CLERKE**, *second Baron*, held strongly the contrary; for it is the queen's prerogative to be satisfied of her debt by any means; and it is no mischief to the *conusee*, for he shall have as much answered to him, as the land is extended at.—But judgment was given for the defendants that they should be discharged.

By 7. Jac. 1. c. 15. no debt shall be assigned to the king which was not originally due to his debtor or accountant.

Hilary

Hilary Term,

34. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt*, Chief Justice.

Sir Francis Gawdy, *Knt*,

John Clench, *Esq*.

Edward Fenner, *Esq*.

} Justices.

Sir John Popham, *Knt*. Attorney General.

Sir Thomas Egerton, *Knt*. Solicitor General.

Pollard against Lock.

CASE 21

Trinity Term, 31. Eliz. Roll 810.

INFORMATION upon the 5. Eliz. c. 9. for perjury. And declares, that whereas *J. R.* brought trespass against him, and he pleaded not guilty, and the plaintiff intituled himself by a feoffment of the land, he shewed a court-roll held before *J. Locke, Gent.* which proved it was copyhold; *prædict' J. Locke* *falsè deposuit*, "that he was not steward at that time," *ubi revera* he was then steward, whereby the verdict passed against him, &c. After verdict, it was alledged in arrest of judgment, that the declaration is insufficient, for here are two *J. Lockes* mentioned, *viz.* the defendant, and *J. Locke* steward, and so may be intended another man: and when it is said *prædict' J. Locke deposuit*, this shall be intended to refer to him that was last named, and not to the defendant; and every declaration ought to be certain, and shall not be taken by intendment.—And for this cause it was adjudged for the defendant. *Vide 10. Hen. 7. pl. 5. B. 5. Hen. 5. pl. 8. 6. Edw. 6. D. 70. 21. Hen. 7. 30. B.*

An ambiguity in a criminal information shall not be cleared by intendment. Ante, 127.

2. T. Rep. 513.

Wing against Earle.

CASE 22

Vide Ante, Page 258. Case 3.

THE case was again moved.—*GAWDY* said, The statute is private, and not being pleaded the Court is to take no notice of it; and so the other matter came not in question: yet he held, that a mile shall be accounted according to the *English* form, and not according to the geometrical computation. And if one sells land, and is obliged that it containeth twenty acres, this shall be according to the law, and not according to the custom of the country.

Miles shall be according to English form, and not geometrical computation. Ante, 212.

FENNER. If the question had been upon the statute, the miles shall be construed according to the usual ways for carriages; but upon the condition, if it be within four miles any way, the condition is broken.—Wherefore it was adjudged for the plaintiff.

Pendlebury

CASE 3.

Pendlebury against Elmott.

In battery and wounding if the defendant justifies the battery, but says nothing as to the wounding it is a bad plea; but for assault would answer all.

March. 47. 2. Cro. 27. 2. Mod. 330. 1. Saund. 14. 28. 2. Vent. 193. 1. Roll. 376. 406. 2. Saund. 127. Lut. 1355. But if the defendant answers in sense, though not in words, it is sufficient. Ante, 255. 1. Salk. 408. Raym. 459. 6. Mod. 705. 1. Lev. 31. 3. Lev. 404. Latch. 122. 3. Roll. 466.

TRESPASS for assault, battery and wounding. The defendant said he was constable of *D.* and for such a misdemeanour of the plaintiff he laid his hands on him, and carried him to the stocks, *quæ est eadem transgressio*. Upon this it was demurred,—And adjudged for the plaintiff; for the defendant did not plead *not guilty* to the wounding, nor justified it; but if one pleads that the hurt which the plaintiff had was of his own assault, this is a good answer to all. And the plaintiff had judgment. 1. Saund. 27.

CASE 4.

Browne against Pendlebury.

Trinity Term, 32. Eliz. Roll 154.

Debt will lie for the arrears of annuity by deed as a contract; and *adhuc arretra existit*, is well enough to shew it was in arrear. Ante, 3. Post. 895.

1. Buss. 151. 5. Mod. 143. 1. Bac. Ab. 119. 2. Bac. Ab. 14.

DEBT. For that the defendant 4. Aug. 32. Eliz. granted to him an annuity of five pounds *per annum* for two years, payable at *Michaelmas*, or within sixteen days after; and declareth, that it was behind at *Michaelmas*, *et adhuc arretra existit*.

Upon this declaration it was demurred.—**FIRST**, Because it is not averred that it was arrear sixteen days after *Michaelmas*. *Sed non allocatur*; for it being alledged, that *adhuc arretra existit*, which is long time after the sixteen days passed, it is well enough.—**SECONDLY**, That debt lieth not for this annuity during the two years, but a writ of annuity. *CURIA contra*. That debt lieth, being a grant for years, for it is by the deed as a contract.

CASE 5.

Fowler against Aston.

Words not importing a certain charge of some offence, are not actionable. Ante, 192.

1. Co. Dig. 188. 2. T. Rep. 473.

ACTION for these words: "I am put out of the parsonage-house by *Fowler*, the patron, who is neither the queen's friend, nor a true subject." After verdict it was alledged in arrest of judgment, that the words were not actionable; and so it was adjudged 16. Eliz. between *Bursted* and *Peck*, that these words, "He is not the queen's friend," will not bear an action.—And afterwards in this term it was adjudged for the defendant, that the words are not actionable.

CASE 6.

Stanley against Osbaston.

It is actionable to call a shoemaker a bankrupt. Cro. Car. 31. Cro. Jac. 345.

584. Skin. 292. 3. Mod. 330. Ld. Ray. 1480. 2. Stra. 762.

ACTION for these words: "He was a bankrupt;" and alledged he was a shoemaker, and used buying and selling of leather.—And it was adjudged that the action did lie, although the plaintiff was not a merchant, but he got his living by buying and selling.

CASE 7.

Seyman against Okeley.

Easter Term, 33. Eliz. Roll 443, or 93.

A release of all demands to a tenant at will does not increase his estate. Co. Lit. 270. 291. b. 5. Co. 56. a. Cro. Jac. 170. 623. 1. Sid. 141. Pyer, 28. 3. Leqq. 152.

TRESPASS. The defendant pleaded that *Frier* was seised in fee, and let to him at will; and afterwards released to him all

accounts,

accounts, suits, and demands, *ab initio mundi*, until the day of the date, by which he was seised for life; &c. The question was, If the estate of the lessee at will was increased?—And, upon motion, resolved by THE WHOLE COURT, that the estate is not enlarged. And the plaintiff had judgment.

SEYMAN
against
OXLEY.

Underhay against Underhay.

CASE 8.

Trinity Term, 31. Eliz. Roll 669.

EJECTIONE FIRMÆ. It was found by special verdict, that *J. S.* made a lease for three lives; and after let the land to *Willmot*, HABENDUM to him for his life, "which said term to begin and have its being after the death, surrender or forfeiture of the three lives." And livery was made *maintenant*. The question was, If this were a good lease, because the words "which said term" appoints that nothing shall begin till after the death; &c. ?—And it was adjudged that forasmuch as the estate was fully limited before the words "which said term," those words are vain and idle; for *utile per inutile non vitiatur*.

A lease habendum to the lessee for his life, which term shall begin after the determination of a previous term for three lives, is good; Ante, 254.

Moor, 381.
2. Roll. Abr. 66. Hob. 171. Buttr. 1973. 2310. 2. Bac. Abr. 493.

Perkins against Perkins.

CASE 9.

Hilary Term, 33. Eliz. Roll 520.

THE case upon special verdict was, The father was tenant for life, the remainder to *Thomas* and *Drew* his sons for their lives. *Drew* purchased the reversion in fee; the father and *Thomas* surrendered to him without deed. The question was, If this be a good surrender?

A surrender cannot be made by tenant for life and remainder man to the reversioner in fee, without deed or words of surrender.

FENNER. The surrender is void; for if it be good, it must first be the surrender of him in the remainder, which cannot be without deed; and it cannot be the surrender of the first tenant for life to him in the remainder, for there is no word of surrender between them (a)

2. Ro. Ab. 498.
2. Ro. Rep. 20.
1. Saund. 151.

Co. Lit. 338. a. 5. Com. Dig. 510.

(a) See 29. Car. 2 c. 3. l. 3. and 23. Geo. 3. c. 58. l. 1.

Wigford against Gill.

CASE 10.

TRESPASS. The case was, *J. S.* erected a mill-dam, part upon his own land, and part upon the land adjoining; the owner of the land adjoining pulls down the dam upon his land, by which all the dam falls down; and the water did run out.—All THE COURT held it was justifiable. So if one erects a wall upon his own lands, and the land of his neighbour, and the neighbour pulls down the wall upon his land, and thereupon all the wall falleth down, this is lawful.

Trespass will not lie for an injury which is the consequence of a legal act. Co. 5. 101. a. b. Ante, 118. 2. Salk. 459.

The Lord Vaux's Case.

CASE 11.

LORD VAUX levied a fine to the use of himself for life, and after his death to the use of his two daughters, till *Ambrose* his son returned from beyond the sea, and came to his full age, or died, which of the said times, days or hours, came first, and then it should remain to *Ambrose*. He returned from beyond the sea, and came of age or died, which ever shall first happen, and then to *B.* this is a good remainder, and shall vest in *B.* immediately on his return, though not of age. Co. Lit. 225. a. Moor. 239. 1. Leon. 243.

A fine to the use of himself for life, with remainder to *A.* until *B.* returned from sea, turned from sea, and came of age or died, which ever shall first happen, and then to *B.* this is a good remainder, and shall vest in *B.* immediately on his return, though not of age. Co. Lit. 225. a. Moor. 239. 1. Leon. 243.

**LORD VAUX'S
CASE.**

The question was, If this remainder be good? and if it be, When it should commence in him, if before his full age?

(a) 2. Leon. 82.
3. Leon. 182.
3. Co. 20.
Dyer, 142.

By all THE JUSTICES, the remainder is good; for although his coming to his full age, or from beyond sea, be uncertain, yet his death is certain, and so it doth not meerly depend upon uncertainties. 4. Mar. Dyer, 142. *A.* deviseth to *Avice* his wife for life, *si tam diu sola vixerit*, and after her marriage or death, the remainder over, it is admitted a good remainder, 13. Eliz. 300. (a) And they agreed the daughters had an estate for their lives conditionally. 3. Aff. 9. 11. Aff. 8.

WRAY, *Chief Justice*, said, that the words disjunctive (*or die*) being in the end of the sentence, make the copulatives before to be disjunctives; so that if one of them be accomplished, the remainder doth vest: and he was induced to it by *Truepenny's Case* in the common pleas, 31. Eliz. where the case was, The husband made a lease for years, if he and his wife or any child of their bodies shall so long live; the wife dieth: and it was adjudged that the lease continued; for the disjunctive that came last made the copulatives before to be of the same nature; and judgment was given in the principal case accordingly. And afterwards a writ of error was brought in the exchequer-chamber; and it was ended by composition.

NOTA. GAWDY said, that if a lease be made to one until *A.* cometh to his age of twenty-one years, and then it shall remain over to another, this is a void remainder; and it is not like a lease for years, the remainder over. But FENNER and THE OTHER JUSTICES were of the contrary opinion in that case.

A lease to two for years if they or any issue of them so long live, continues during the life of the survivor.

Owen, 52.
3. Leon. 74.
1. And. 161.
Co. Lit. 225.
431. 4. Bac. Abr. 309.

NOTA. The *Case of Truepenny* cited before, was between *Baldwin and Coke*, and it was thus: *A.* having an intent to marry *B.* one of the friends of *A.* and for the preferment of *B.* made a lease to *A.* and *B.* for sixty years; if *A.* and *B.* or any issue of their bodies so long live: and it was adjudged that the lease doth continue as long as any of them live, for so was the intent of the parties. And ANDERSON commanded NELSON the prothonotary to enter upon the record, that the lease continued so long as any of them live. *Vide Co. Lit.* 225. 2.

Moore, 239. 372. Goldf. 71. Dalif. 2. Cro. Jac. 71. 1. Wils. 262. 1. Bac. Abr.

CASE 12.

The hundred is answerable for a robbery committed in any time of the night in which men commonly travel.

Post. 954.

7. Co. 6. b.
Cro. Jac. 106.

Ridgeley against the Hundred of Warrington.

ACTION upon the statute of hue and cry.—Upon the evidence it was held by ANDERSON and all THE JUSTICES, that whereas the statute speaks of robberies done in the day before night, yet if a robbery be committed in the morning before day, or in the evening after the day, in any time of the night in which men use commonly to travel, that the hundred is answerable for it; but if it be at twelve or one of the clock in the night, at which time every one is intended to be in bed, the hundred is not answerable for the robbery.

1. Sid. 263. 1. And. 159. Stiles, 233. 2. Hawk. P. C. 117. Wood's Inst. 364.

CASE 13.

The lessee of an outlaw shall have trespass for the profits received between the assignment and the reversal.

2. Lev. 49. 2. Ver. 313. 13. Co. 20. 28.

Ognell's Case.

TRESPASS. The case was upon special verdict, that a tennor being outlawed for felony, granted his term and interest to

the plaintiff, who is put out by *J. S.* and afterwards the outlawry is reversed; and the plaintiff brought trespass for the profits taken between the outlawry reversed and the assignment. And the question was, If the action did lie? for that during that time the queen had the interest, and the assignee had no right.—And it was adjudged for the plaintiff; for by the reversal, it is as if no outlawry had been; and there is no record of it.

OGNELL'S
CASE.

Johns against Philips.

CASE 14.

Michaelmas Term, 33. & 34. Eliz. Roll 2101.

SECOND DELIVERANCE. The case was, A woman made a lease for life, and afterwards granted the reversion for 1000 years; and before attornment she takes *J. S.* to husband, and afterwards the tenant attorned to the grantee.

Attornment too late after the marriage of the grantor.
Co. Lit. 310. b.
1. Com. Dig.

THE COURT resolved, and agreed, that the attornment came too late (*a*): but for some faults in the pleading no judgment was given.

(*a*) See 4. & 5. Ann. c. 16. by which the necessity of attornment is taken away.

William Richbell against Edward Goddard.

CASE 15.

Trinity Term, 33. Eliz. Roll

ACTION upon the case against the defendant, sheriff of the county of Southampton. That whereas *J. Gold* being indebted to him by two several obligations, one payable 21st Nov. 33. Eliz. he on the 17th Nov. 33. Eliz. procured a *latitat* out of the queen's bench, returnable *Ostabis Hillarii*, intending to declare against *Gold* upon these two bonds, which writ was delivered to the defendant 20th Nov. 33. Eliz. *apud S.* and the defendant by force thereof, 4. Dec. 33. Eliz. did arrest *G.* at *S.* and afterwards 14. Dec. 33. Eliz. suffered him to escape at *London*, by which the plaintiff lost his debt. Upon not guilty pleaded, it was found for the plaintiff.

The sheriff is answerable for an escape, though the writ was sued out before the debt was due, if the party was arrested after; and the trial shall be where the escape, and not where the arrest was made.

It was alledged in arrest of judgment,

FIRST, That this process was taken out before the debt was due upon one of the obligations; and then the plaintiff had no cause of action for it; and so being an entire suit, it shall abate in all.—*Sed non allocatur*; because the arrest was after the debt was due; and this (if a good plea) was to be pleaded by the party himself, and not by the sheriff, for he must answer his own tort.

Ante, 165.
Post, 625.
7. Co. 2. a.
Poph. 205.
2. Saund. 100.

SECONDLY, It was alledged that there was a mis-trial, being tried in *London*, whereas the issue NOT GUILTY refers to the whole matter; and the arrest which was the principal was at *S.* and without it there can be no escape, and the trial should be of *S.*—*Sed non allocatur*; for the escape is the matter upon which the action is grounded, which was alledged to be at *London*; and the venue shall be of the place where the escape was, and not of the place where the arrest was. And it was adjudged for the plaintiff.

Smalbroke

CASE 16.

Samlbroke against Dabridgecourt.

Hilary Term, 34. Eliz. In the Exchequer Chamber.

Vide Ante, page 178. Case 9.

A promise to an under-sheriff to save the sheriff harmless from escape, in consideration that he will permit a particular person to execute the writ, is good, Ante, 84. 178.

ERROR of a judgment in the queen's bench. The errors were assigned by GODFREY.

FIRST, That there was no consideration; for it was no benefit to the plaintiff to take the body of Lane, and it was the sheriff's duty to execute the process.—*Sed non allocatur*; for he being an officer appointed by S. the now plaintiff, it is no reason the sheriff should be at any loss by his appointment; and therefore it was a good consideration.

SECOND ERROR. This *assumpsit* cannot discharge a future escape.—*Sed non allocatur*.

THIRD ERROR. The escape is alledged to be 8th Novemb. 29. Eliz. and the defendant answered to an escape 30th Decem. 30. Eliz.—*Sed non allocatur*; for the plaintiff may alledge it at any day, and the defendant may answer to it according as the truth is.

FOURTH ERROR. That this *assumpsit* is in nature of a bond, and so against the 23. Hen. 6. c. 10.—*Sed non allocatur*; for as the party may discharge a prisoner in execution, so he may foreclose himself from the benefit, if the prisoner escapes, and the statute never intended to help him that forecloseth himself.

FIFTH ERROR. That there was no *venire facias*.—*Sed non allocatur*; for that is to be alledged by way of diminution; and the *venire facias* is never certified; and this is after verdict, and so cannot be alledged. And the judgment was affirmed.

CASE 17.

Tenancy against Browne.

What certainty is sufficient in averring performance of a condition precedent.

ERROR of a judgment in the queen's bench, upon a promise.

FIRST ERROR. That the plaintiff in the action declared, that whereas the defendant was indebted to him in ten pounds, he did assume that if the plaintiff would forbear him one week, that he would pay it; and alledges, that he did forbear him for one week, but saith not for one week following.—*Sed non allocatur*; for it cannot be otherwise intended.

The qualification required of jurors, does not extend to 28. Edw. 3. c. 13. Post. 841. a. Hawk. 590.

SECOND ERROR. For that the plaintiff being an alien, the trial was *per medietatem linguæ*, and the *venire facias* was *quorum quilibet habet* four pounds land, whereas an alien can have no land.—*Sed non allocatur*, for it shall be referred only to the *English*. And the judgment was affirmed.

Easter

Easter Term,

13

34. Eliz. In the Queen's Bench.

Sir Christopher Wray, *Knt. Chief Justice.*

Sir Francis Gawdy, *Knt.*

John Clench, *Esq.*

Edward Fenner, *Esq.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

} *Justices.*

Jordan against Lyfter.

CASE 11.

ACTION for words: "What art thou? A bankrupt, and
"wast a bankrupt." After verdict, COKE moved in arrest
of judgment, that the declaration was, *quod cum fuit mer-*
cator per magnum tempus, &c. but saith not he was a merchant at
the time of the speaking the words, and therefore the declaration
is insufficient; and the words here are interrogative and not di-
rect.—But THE COURT held the declaration to be good, being al-
leged that he was *per magnum tempus* a merchant, &c. and that
his answer to the interrogation is a direct affirmance; but they
would advise, &c.

In an action for
calling a mer-
chant a bank-
rupt, *quid fuit*
mercator per
magnum tempus
is sufficient.
Post. 794.
Cro. Car. 281.
Cro. Jac. 223.
107. 444. 673.
4. Bac. Ab. 513.

Marthe's Case.

CASE 12.

Ante, Page 225. Case 10.

THE case was argued by ALTHAM, that the writ of error lieth
by the executors, for the loss of the goods which they shall
otherwise have; for it may be he had no lands, nor any loss to
any other than the executor; and so it is reason that they should
have the suit to reverse the outlawry, and to be restored to the
goods; and for that, vouched 43. *Affise* 41. & 49. 34. *Hen. 6.*
pl. 32. 15. Edw. 3. "Error," where two may have several writs of
error or attainst for several losses; and 43. *Edw. 3. pl. 32.*
46. *Edw. 3. pl. 25. 19. Edw. 4. pl. 5. & 6.* where executors shall
have a *scire facias* for the damages recovered, and the heir for the
land. And he shewed two precedents, *Mich. Term, 11. Hen. 8.*
Roll 13. where one Sudely was indicted for robbery and outlawed,
the executor brought a writ of error; and one error was assigned,
that no proclamation was awarded; and a second error, for that there
was not five months between the date of the *exigent* and the return of
it; and there a *scire facias* was awarded against the lords of the fee,
and it was returned there were no ter-tenants; and the outlawry
was reversed. The other precedent was *Trinity, 18. Hen. 7. Roll 3.*
where one was indicted of murder and outlawed; and the admini-
strator brought error; and the error assigned was, Because the in-
dictment was *contra pacem domini regis*, whereas the offence was in the
time of Richard the third—COKE argued *contra*: for that the out-
lawry trencheth in the realty, and the lands and goods are forfeited,
and the blood is corrupted, and therefore the executor shall not have
error, *quia de minimis non curat lex*: and for that reason, at the com-
mon law, tenant for years shall not falsify a recovery which binds
the

A writ of error
lies by an exe-
cutor to reverse
the outlawry
for felony of
his testator.
Ante, 225.
1. Leon. 325.
Owen, 147.
1. Roll. Abr.
558.
Godb. 377.
380.
Swinb. 367.
2. Hawk. 654.
1. Salk. 295.

MARINE'S
CASE.

Co. Lit. 256. b.

the land in the realty, 39. Hen. 6. "*Falsifie Recovery*," 19. So at the common law, a traverse shall not be of an office which finds a wardship, &c. for the king (for they were but chattels) until the statutes of 28. Edw. 1. ft. 3. c. 18. & 2. Edw. 6. c. 8. And for the precedents cited, he said the errors were such as were apparent faults which were reverfible by motion; and although the books of 19. Hen. 6. pl. 2. & 2. Rich. 3. pl. 21. are, that an outlawry erroneous in this court is not reverfible by plea, but by writ of error, yet he said the law is otherwise.—But THE JUSTICES held, that an outlawry here cannot be reverfed by plea, but ought to be by writ of error; and the clerks said, fo was the courfe always. But for the matter they would advife.

NOTA. 5. Coke f. 111. this case is it was reverfed at his fuit. V. Pasch. 39. cited to be reverfed that the writ of error Placito 14. fol. 558. was well brought by the executor, and that

CASE 3.

Pett againft Bafeden.

Easter Term, 33. Eliz. Roll 398.

A legacy "*pro et in exoneratione*" of dower, is conditional; and if the legatee sue for the legacy in the fpiritual court, and the executor plead that he offered to pay it on receiving a difcharge, and the court refuse the plea, a prohibition shall go.

PROHIBITION. The plaintiff declared, That whereas *M. Pett* was feifed in fee of divers lands, and being fo feifed made his will, and made the plaintiff his executor, and devised part of his land to his eldeft fon in fee, and that he should have it when he came to his age of twenty-one years; and that in the mean time the executors should take the profits for payment of debts and legacies; and devised 100l. to *Rose* his wife *pro et in exoneratione* of her dower in the faid land, to be paid by his executor within one year after his death; and that he died, and the defendant married *Rose*. And further alledged, that the defendant, in consideration that the plaintiff promised to pay him the 100l. within one year after the death of the testator, did agree and promise to the plaintiff to make him a reasonable difcharge of the 100l. and also to the plaintiff and the fon a reasonable difcharge of the dower of *Rose*: and alledged *in facto*, that he offered the payment of the 100l. to the defendant, and required a difcharge of the faid 100l. and of the dower; yet he intending to have the faid 100l. and after to recover the dower of the land, fued for this legacy in the court christian; and although he offered there the 100l. fo as the defendant would make a difcharge of dower, yet they refused to accept this offer, and thereupon he fued a prohibition. And upon this declaration it was demurred in law.

FIRST, Because this legacy is properly fuable and recoverable in court christian.

SECONDLY, This agreement is no caufe to draw it out of the fpiritual court.

THIRDLY, He had not fhewed performance of the agreement; for he faith he offered it, but faith not that he paid it, nor that the defendant refused it.

FOURTHLY, He fheweth not the time he offered it.

But THE COURT upon motion were of opinion, that the prohibition did lie: for here the words, "*pro et in exoneratione*" make a condition, that he shall not have the hundred pounds until he make a difcharge of dower, &c. Then when he alledged, that he would have paid it, if the other would have difcharged, &c. it is good enough, and the agreement between them is a caufe of an action upon the cafe at common law; and this plea being ministered in the fpiritual court, and they refused, is a good caufe of prohibition.

Co. Lit. 264. a.
Co. 10. 42. a.

• Wyngate against Marke.

CASE 4.

IT was held upon evidence, that if the lessee for years of the queen be ousted by a stranger, yet although he be out of possession, he may assign over his term; for the reversion being in the queen, he cannot be out of possession but at his pleasure.

ousted of his possession by a stranger. Ante, 15. 1. Sid. 399. Owen, 216. 1. Com. Dig. 402.

And it was held, that where an action was brought by an alien as administrator of J. S. who was *English*, the parties being at issue, the trial being *per medietatem linguæ*, that it was not well tried, and the judgment was stayed; for when the plaintiff brings an action not in his own right but as administrator, the trial shall be by *English* only: and so was it held, 23. Eliz. in *Dr. Julio's Case*. But if it had been averred that the intestate had been an alien, it would be otherwise.

A lessee for years of the crown may assign his term, though he is

Where an alien sues as administrator to an English intestate, the trial shall be by an English jury only.

Argenton against Westover and Lucas.

CASE 5.

Easter Term, 33. Eliz. Roll 1680.

ERROR to reverse a fine.—FIRST ERROR. It appeareth by the record, that the caption of the conuſance of the fine was before SIR ROGER MANWOOD, Chief Baron, 27th March 27. Eliz. and the writ of covenant and *dedimus potestatem* bore teste 9th April, so the conuſance taken without warrant; and by the 23. Eliz. c. 3. the day of the caption is always to be certified. But THE COURT over-ruled it, and would not hear it argued; for they said it is good enough, and otherwise they should reverse divers fines.—SECOND ERROR. The writ of covenant was, *de manerio de Cortbuthether*, and the *dedimus potestatem* was, *de manerio de Cortbether*; and for this variance there is no conuſance upon the writ. But it being with an *alias Cortbuthether*, it was held good.—Afterwards in Easter Term, 35. Eliz. it was moved again, and other errors assigned.—FIRST, That by the caption of the fine upon the *dedimus potestatem*, the land was given to Westover and his wife, and to the heirs of the body of the baron of the body of the *feme* begotten; and the fine engrossed was, to the heirs of the body of the baron upon the wife begotten; so is variant. But ALL THE JUSTICES conceived, that it was not material; for in both cases the *feme* had but an estate for life, and the baron an estate tail, and the words are of the same sense.—SECONDLY, POPHAM, Chief Justice, took an exception, that the writ of covenant and the caption was, *de manerio & tenement*. and five shillings rent, and the fine engrossed was, *de manerio & tenementis*. But it was said and agreed, that the course of fines is, that if the rent be under five pounds, that they use not to mention it in the fine engrossed.—THIRD ERROR assigned was, For that the caption was, *si contingat the baron to die without issue*, that it should remain over; and the fine engrossed was, *si contingat that the baron and feme die without issue*, that it shall remain over; so it is variant. But it was held all one, for the estate in remainder is always limited upon the more long estate which is the estate tail, yet it was all of one sense.—And afterwards the fine was affirmed.

Error to reverse a fine for variance. Post. 677. 740.

3. Com. Dig. 347, 348. 1. Wood's Con. 590. Cruise on Fines 83.

CASE 6.

Foxe against Goodson.

If a declaration in *assumpsit* for costs of suit, omit to state what costs were expended, it is erroneous on demurrer, but good after verdict.

Yelv. 110.

1. Sid. 413.

2. Saund. 373.

Crö. Car. 573.

Raym. 8.

3. Bulst. 31.

Strange, 127.

ASSUMPSIT. That whereas the plaintiff had sued such an action against the defendant, and being at issue had sued out a *nisi prius* upon it; the defendant, in consideration the plaintiff would surcease his suit, promised to assign such a lease to him, and to pay his costs of suit: and alledges he had surceased, and the defendant had not assigned the lease, nor paid his costs of suit. And upon *non assumpsit* pleaded, it was found for the plaintiff. It was alledged in arrest of judgment, that the declaration was not good, because he did not alledge what costs he had expended.—And ALL THE JUSTICES were of opinion it was not good for that cause, and the defendant might have demurred upon it; but he not demurring, but taking issue, he shall not now have advantage of it. And thereupon it was adjudged for the plaintiff.

CASE 7.

Wroth against Wiggs.

The jury are not compellable to find a prisoner guilty of manslaughter on an appeal of murder.

Post. 296. 465.

4. Co. 43. 47.

1. Sid. 325.

3. Hale, 449.

APPEAL of murder. The defendant pleaded not guilty, and being arraigned by a substantial jury of *Middlesex*, the evidence was pregnant that he was guilty of man-slaughter, but for the murder was doubtful. The jury found he was not guilty of murder; and being demanded if he was guilty of man-slaughter, they answered they had nothing to do to enquire of it.—Upon this THE COURT, being in doubt, sent FENNER, *Justice*, to the common pleas to know their opinion; who conceived, that by the law the jury are not compellable to inquire of the man-slaughter.

Thereupon they gave their verdict as before; and the prisoner was discharged. 9. *Eliz.* Dyer, 261. a. (a).

(a) But the jury may find the defendant guilty of manslaughter. See Old Bend. 172. 2. Roll. Rep. 460. L. C. B. PARKER'S MSS.

CASE 8.

Green against Piper.

By the common law no tithes are payable for a dwelling-house.

Sed vide

5. C. Moor,

912.

3. C. Dig. 108.

IT was held by THE JUSTICES, that a house in *London* which was part of the possessions of a priory that was discharged of paying tithes of their possessions, yet by the 37. *Hen.* 8. c. 2. shall be charged for tithes according to the ordinance there; for before that statute no dwelling-house was chargeable for tithes, because no profit ariseth of it, and only noblemen's houses are excepted. And it was adjudged accordingly, and a consultation was granted:

1. Roll. Abr. 636. Hob. 11. 11. Co. 16. a.

CASE 9.

Scory against Baber.

A *modus* to find straw for the body of the church in lieu of the tithes of hay is not good. Ante, 71.

2. Bro. Ch. Caf. 361.

Dougl. 104.

PROHIBITION against the proprietor of the church of *South-kirby* in the county of *York*, who sued for tithes of hay; and surmised, that time out of mind the owners of these lands had found straw for the body of the church in discharge of all tithes of hay. COKE moved, that this is no cause of discharge, for the parson was not chargeable with it, nor had any benefit by it; and in *Hilary Term*, 30. *Eliz.* it was ruled, that where one prescribed that he had used to pay the parish-clerk his wages in satisfaction of tithe-hay, this was

no discharge.—And of that opinion was THE WHOLE COURT. But if he had alledged that he gave the straw to the parson, and he bestowed it in the body of the church, or that the parson had a seat in the body of the church, it had been otherwise: and thereupon consultation was granted.

SCORY
against
BARR.

Easter Term,

34. Eliz. In the Common Pleas.

Sir Edmund Anderson, *Knt. Chief Justice.*

Sir William Periam, *Knt.*

Thomas Walmsley, *Esq.*

Francis Beaumont, *Esq.*

} *Justices.*

Sir John Popham, *Knt. Attorney General.*

Sir Thomas Egerton, *Knt. Solicitor General.*

Lyfs against Watts.

CASE I.

PROHIBITION upon a libel for tithes of slate stones. The defendant prayed a consultation, for that heretofore the plaintiff sued a prohibition for the same cause in chancery, and upon the same libel, and there a consultation was granted; for otherwise he shall be infinitely vexed, that when one court grants a consultation, he shall sue a prohibition in another court.—And of this opinion was all THE COURT, that he shall have a consultation, if before a consultation was granted in another court upon the same cause. And it was here held by THE JUSTICES, that no tithes are due of a quarry of slate or stone, for the parson may have tithes of the grass or corn which groweth upon the surface of the land in which the quarry is.

No tithes due for a quarry of stone; and if one court grant a consultation, it is a ground to refuse a prohibition in another. Post. 736.

2. Inst. 651.
1. Roll. 637.
4. Co. Dig. 518.
Dougl. 620.

Tropp against Bedingfield.

CASE 22

DEBT upon an obligation. The condition was, that if J. S. perform the arbitrament of J. N. if any be made before the feast of *Easter*; and if none be made, if the said J. S. came to the Guildhall in *Norwich* at the feast of *Pentecost*, and there suffers himself to be arrested at such a suit, and doth not remove himself; if such suit be commenced, but shall answer to the action without delay, or pay to the plaintiff at the feast of *Michaelmas* ten pounds; that then, &c. The defendant pleads, that no arbitrament was made before the feast of *Easter*, that J. S. died before *Pentecost*, and answered nothing to the residue of the condition. The question was, If it were a good plea?—And THE JUSTICES upon the first

Quere, Whether a condition in the alternative is broken, if one part becomes impossible by the act of God? Ante, 10. Post. 399.

5. Co. 22.
Moor, 357.
Poph. 98.

1. Roll. Ab. 450. Jones, 171, 181. 2. Mod. 201. 3. Mod. 232. Dougl. 690.

TROFF
against
BEDDING-
FIELD.

motion conceived it was, because that by the act of God he is deprived of his appearance; and so his bond is saved, although he pay not the ten pounds, for he had election to do the one or the other: but they would advise.

CASE 3.

Mason against Nevill.

Special pleading.

TRESPASS. The defendant pleads, that *Alex. Nevill* his ancestor was seised, and died seised, and the land descended to him as son and heir, &c. The plaintiff replied, that long time before *A. Nevill* had any thing in the land, *J. S.* was seised in fee, and infeoffed four others to the use of himself and his wife for their lives, and after to the use of *W.* his son for life, and after his decease that they shall be seised *ut in eorum pristino statu*, upon condition that they shall receive the profits, and pay to *B.* the wife of *W.* twenty pounds *per annum* during her life, and after they shall be seised to the use of the heirs males of the body of *W.*: that the baron and feme died; that *W.* entered and infeoffed the said *Alex. Nevill* and died, who entered, and devised it by his will in writing to his younger son for life: and afterwards *A.* the wife of *W.* died, and *Nich.* as son and heir of the body of *W.* entered, and let to the plaintiff.

Upon this it was demurred in law.—First, Because he did not traverse the descent.—Second, Because, as this case is, the heir male of *W.* cannot enter; for by the feoffment the estate tail is discontinued, and none can enter except the feoffees enter and revive the use.

But after motion of the case by the serjeants, without any great argument, THE COURT gave judgment for the plaintiff; for the descent is not traversable, but the dying seised, which is confessed and avoided by the devise.—And PERIAM said, the descent in any case is not traversable, but where both parties claim by the same person; and that this feoffment was no discontinuance, nor barred the entry of the heirs.—*Quere* the reason, for the Court did not shew any reason of their judgment. 14. Hen. 8. pl. 23. 19. Hen. 8. pl. 6. 21. Eliz. Dyer, 366.

Ante, 30.
2. Cr. 221.

CASE 4.

Eyre against Woodfine.

Easter Term, 33. Eliz. Roll 818.

If a termor for years be outlawed, he shall be restored to the term on reversal of the outlawry, tho' it has been sold by the king.
Ante, 270.

Moor, 270. 237.

573.

5. Co. 90. b.

8. Co. 143. a.

3. And. 277. 188.

2. Ver. 315. 2. Jones, 104. 2. Lev. 49. 2. Hawk. 656. 2. Bac. Abr. 232. 370. 2. Crom. Prac. 61.

EJECTIONE FIRMÆ. The case upon special verdict was, A termor for years being outlawed upon the statute of recusancy, by which his term was forfeited to the queen, the lord treasurer and barons of the exchequer sold it for ten pounds to *Fr. Michel*; and afterwards the outlawry was reversed. The question was, If the termor shall have again his term?—And after argument by GLANVILLE of the one part, and BEAUMONT of the other part, ANDERSON and WALMSLEY, *Justices*, conceived the termor shall have again his term, and not the money for which it was sold; and in whosesoever hands the lands came, and by whatsoever consideration, the party shall be restored; for the outlawry being reversed, it is as if there were no record, and the queen's interest

was

was but conditional, viz. it is good if the outlawry be good; and therefore the term being sold, it is tied with the condition into whomsoever hands it cometh, that if the outlawry be reversed, the term is reduced to the owner. And it is not like a sale made by the sheriff, for the sheriff sells it by authority of law to levy the money; and there if the judgment be reversed, the party shall be restored only to the money and not to the term; for he lost it not by the judgment.—But PERIAM doubted, and said, that although by the YEAR BOOK of 11. Hen. 4. pl. 65. that upon the reversal of the outlawry the party shall have restitution, yet the Book speaks not if it be sold before. And here it is mischievous of both sides, if the party that bought it lawfully shall lose it; and of the other side, if the other shall not be restored to it, he shall have nothing; for it will be hard to be restored to the money out of the queen's coffers.—But afterwards, Trin. 34. Eliz. ANDERSON and WALMSLEY gave judgment for the plaintiff, PERIAM not being resolved in it. Vide 20. Eliz. Dyer. 363.

EYRE
against
WOODFINE.

Loftus' Case.

CASE 5.

NOTA. PUCKERING demanded the opinion of THE JUSTICES in this case. Loftus being possessed of a term for eighteen years, and of another term in the same land in reversion for forty years, died intestate; his wife takes administration and enters, and marrieth J. S. who let it to J. D. for twenty-one years, rendering rent, and makes his executor and dieth. The question was, If his wife or executor shall have the rent?—PERIAM. During the first term for years the executor shall have it; for the baron had given away all that term, and no interest remained in the feme, and the rent by the indenture shall go to the executor; but for the residue of the term of twenty-one years, which is derived out of the lease for forty, the wife shall have it, as annexed to the reversion or term which the wife had.—Quære, for the other Justices delivered no opinion.

If a husband makes a lease of part of his wife's term, and dies, the wife and not the executor shall have the rent.
Ante, 33.
Sed quære.
Vide Poph. 5.
97. 145.
Co. Lit. 46. b.
151. a. 300. a.
Cro. Car. 344.
Plowd. 418.
8. Co. 97.

Roll. Ab. 841. Godb. 279. 3. Keb. 299. Vent. 259. 3. Will. 278. 2. Bl. Rep. 801. Cowp. 201. Dougl. 53.

Bayly against Churington.

CASE 6.

ACTION for these words: "Thou art a false knave: thou wast arraigned for two bullocks."—Adjudged that the words were not actionable; for he saith not he was arraigned for stealing two bullocks: and if the words had been so, yet the words had not been actionable; for a man may be arraigned for felony, and yet be no felon.

Words not actionable.
Cro. Jac. 268.
2. Will. 300.
B. R. H. 339.

Charnel's Case.

CASE 7.

ACTION for words against husband and wife, because the wife said, "My turkies are stolen, and Charnel hath stolen them." It was moved that an action lay not; for it appears that the feme could have no turkies, for they are the baron's, and so could not be true; and then no discredit.

Words importing theft from a feme covers are actionable, tho' she can have no goods.

Cro. Jac. 200. 1. Roll. Abr. 74. 4. Bac. Abr. 509.

CHARNEL'S
CASE.

CURIA contra. Because she had charged him with stealing; and if one which had no horse faith, "J. S. hath stolen my horse," this is as great discredit as if he had had one, for every one knoweth not whether he had a horse or not.

CASE 3.

Blitheman against Blitheman.

A covenant by tenant in tail that the land shall remain and be to his son after his death is void, but his wife shall be endowed.

Post. 345. 471. 895.

Co. 2. 53. 2. 72.

1. And. 291.

Moor, 683. 940.

Yelv. 51.

1. Roll. Ab. 677.

Sh. Touch. 509.

Gilb. Use,

60. 115.

2. Ld. Raym.

781.

DOWER. The defendant pleads, *ne unques seise per dower, &c.* and upon this they were at issue. The jury found a special verdict, that J. Blitheman, the husband of the demandant, and father of the tenant, was seised of the land in tail, and in consideration of a marriage of the tenant his eldest son, covenanted by indenture, that this land after his death shall descend, remain, or shall be to the son and his heirs; and afterwards he taketh the demandant to wife and dieth. And, if he was seised of such an estate of which she was dowable? was the question.—And THE COURT resolved for the demandant: for by the indenture no estate was altered in the baron, but he remaineth tenant in tail as before; and this for two causes.

First, Because it is only a covenant and executory, for which an action of covenant lieth if he perform it not; for it is not that he will stand seised to the use of himself for life, and after to the use of the son, but only to that it shall descend, remain, or be to the son after his death; which may be by his permission that it shall descend and be to the son, without any alteration of the estate.

2. Levinz, 84.

Post. 471.

Second, If it were an expresse covenant that he would stand seised to the use of himself for life, and after to his son, this had been void to alter the use to the son; for he being tenant in tail, and reserving to himself an estate for his own life, in that he reserved all that he might lawfully dispose; and then by the covenant he can dispose of no more than he can lawfully do; and so the limitation after his death is merely void, and the estate remained in him as before (a). For both which causes, but principally for the first, they held the demandant should have judgment; and it was given accordingly. *Vide 2. Co. f. 52.*

(a) It is now settled that a re-lease or a bargain and sale by a tenant in tail is not absolutely void, but gives a base fee, voidable by the issue in tail. Salk. 619. Comyns, 120.

7. Mod. 18. 11. Mod. 19. 3. Burr. 1705.

NOTE. On the last day of *Easter Term*, 34. *Eliz.* died Sir Christopher Wray, *Knt.* chief justice of her Majesty's court of queen's bench; a most reverend judge, of profound and judicial knowledge, accompanied with a very ready and singular capacity, and admirable patience. He was succeeded by Sir John Popham, *Attorney General.* 3. Co. 26. 6. Co. 75. Cro. Jac. 156.

Trinity Term,

281

34. Eliz. In the Queen's Bench.

Sir John Popham, *Knt.* Chief Justice.

Sir Francis Gawdy, *Knt.*

John Clench, *Esq.*

Edward Fenner, *Esq.*

} Justices.

Sir Thomas Egerton, *Attorney General.*

Sir Edward Coke, *Solicitor General.*

Fox against Lee.

Trinity Term, 33. Eliz. Roll 555.

CASE 1.

ERROR of a judgment in *Ludlow*, in debt upon an obligation. The condition was for payment of seventy pounds, *scil.* 35 l. at one day in the Temple church, London; and 35 l. at another day. The defendant pleads payment of the seventy pounds at *Ludlow secundum formam et effectum conditionis prædictæ*; and issue taken upon it, and found against him, and judgment given for the plaintiff. And two errors were assigned.

To bond for the payment of money on several days certain, plea of payment *secundum formam et effectum conditionis prædictæ* is good.

FIRST, That he alledged payment of the seventy pounds according to the condition, where he ought to plead several payments, of thirty-five pounds at one day, and of the other thirty-five pounds at the other day, and not to couple them together.—But THE COURT held it good enough; for when he pleads payment *secundum formam et effectum conditionis prædictæ*, this *reddendo singula singulis* is as if he had pleaded he had paid them severally at the several days.

1. Lut. 349. 571.
2. Bulst. 267.
1. Lev. 145.

SECOND ERROR. For that the names of the jurors did not appear of record.—But it was held good enough, for that never appeareth where the jury is full of the principal pannel; but where the inquest is part of the principal pannel, and part by *tales de circumstantibus*, there the names of both shall be entered upon record.—And the judgment was affirmed.

When the jurors names shall be recorded.

Yates against Windham.

CASE 2.

Vide Ante, Page 64. and 155.

IT was moved this term.—COKE shewed that upon the second writ, *quod coram vobis residet*, the plaintiff assigned new errors, *scil.* a discontinuance; and that the judgment was, that the defendant *fit in misericordia*; whereas it appeareth, that the defendant did appear upon the summons. To which the defendant in the writ of error appeared and pleaded, that heretofore the plaintiff brought a writ of error upon this judgment, and shewed all the proceeding in it; and that this is discontinued, in which none of these errors were assigned: and upon this the plaintiff demurred in law.—COKE argued, that this writ of error, and the errors assigned upon it, cannot be maintained.—First, The plaintiff cannot alledge diminution to reverse a record, after errors assigned, and *scire facias* sued upon it; nor can the defendant alledge it after *in nullo est erratum* pleaded, for by it the record is affirmed; and so

Error *coram vobis* may be brought after the first writ discontinued and errors assigned, and the plaintiff may assign the same or other errors, either within or without the record; but it must be entered on the same roll with the first writ.

YATES
against
WINDHAM.

Carth. 370.
Co. Ent. 269.
1. Stra. 609.
Ld. Ray. 151.
1403.

28. Hen. 6. 7. Edw. 4. & 22. Edw. 4.—Secondly, In a writ of error *coram vobis residet*, the plaintiff shall not assign errors but in the record removed, and not in the judicial process; for the words of the writ are, that there is error *in recordo quod coram vobis residet*; so it is admitted, that this is all the record.—Thirdly, Upon a writ of error, *quod coram vobis residet*, the entry is *allegando errores prædicti in formâ prædicti allegat.* and so is the precedent *Trin.* 20. Hen. 7. 88. But if these errors be over-ruled, he may assign other errors within the record: but here is no mention of the former errors. Also this is entered in another roll, and not upon the same roll, so that the Court might see all together, and so is the course; otherwise the Court shall not intend it to be the same cause, and the Court shall be compelled to infinite search, which the law will not allow.—But THE JUSTICES said, that inasmuch as the first writ is discontinued, and this is a new writ sued, the plaintiff is not tied to the former errors, but may assign other errors at his pleasure; for it is now as if no errors were assigned before, and he may assign other errors in the record, or other errors out of the record; and this removing of the residue of the record in this manner is well allowable; and these errors may be well assigned: and as to these points they were satisfied; but for the entry of it upon another roll, they doubted, and would advise.—And afterwards for this cause it was held a mis-entry, and the plaintiff put to a new writ of error.

CASE 3.

Beaucamp against Neggin.

Money paid for the use, and at the request of another, raises a continuing consideration.

Comp. 289.
1. Term Rep. 21. 286.
2. Term Rep. 370.

Vide ante, 42.
and note (a)
p. 260.

ERROR of a judgment in *assumpsit*.—First error. For that Neggin the plaintiff in the *assumpsit* declared, that whereas the said Beaucamp, in consideration that the said Neggin had paid for him, and at his request, to C. at such a day (which was a year before the promise) ten pounds, he assumed to repay it *cum inde requisitus esset*. Which consideration is not good, because it was for a thing past.—Second error. The *assumpsit* was laid at Worcester in *Alta Warda ibidem*, and the *venire facias* was of the city of Worcester, whereas it should be *de Alta Warda*; for by it, it is intended there be more wards. *Sed non allocantur*. For as to the first, when the payment is laid to be at his request, the consideration doth continue, and so is the common course. And as to the second error, it shall not be intended that there be more wards, except it be alleged.

CASE 4.

Brown against Worsely.

Trinity Term, 33. Eliz. Roll 683.

Damages severally assessed for calling another "a whore and a thief," and the judgment affirmed as to the one, and reversed as to the other. Post. 329.

2. Roll. Ab. 51.
4. Co. 18. a.
10. Co. 130. b.
Cro. Jac. 114.
Doug. 739.

ERROR of a judgment in the common pleas, in an action for words, viz. "Thou art a whore and a thief, for thou hast poisoned thy husband." Upon not guilty pleaded, the jury found against him, and assessed damages for the first words, six pounds six shillings and eight-pence; and for the other words, twenty marks. These damages were severally assessed by the advice of the L. C. J. ANDERSON, before whom it was tried; and thereupon several judgments were given for the damages. And upon this error was brought, for the words will not maintain an action. For the first words, suit for them is to be in the spiritual court, and no remedy for them at common law. And as for the second words, although the word "thief" will maintain an action, yet

the

the words subsequent will not maintain the former.—But *Mich.* 34. & 35. *Eliz.* the judgment was affirmed, that an action lay for the last words: but for the words “Thou art a whore,” no action lay; and as to that, the judgment was reversed.

BROWN
against
WORSLEY.

Pyers against Turner.

Hilary Term, 34. Eliz. Roll 766.

CASE 5.

ASSUMPSIT, as administrator to *Greenway*. And declares, That whereas one *Walter Turner*, the son of the defendant, was bound by obligation of eighteen pounds to the intestate; which money was not paid at the day, but the son moved the father to pay it for him; the defendant, in consideration that the intestate would give him a longer day, promised to pay it; and that the intestate gave him a longer day, *scil.* the sixth of *May*, &c. And upon *non assumpsit* pleaded, it was found for the plaintiff.—And it was now moved in arrest of judgment, First, That he did not shew the place where administration was committed, as 35. *Hen.* 6. pl. 31. is. *Sed non allocatur*; for it is good in a declaration, but not in a bar.—Secondly, It was moved that here is no consideration; for the giving day to the father who was not indebted, is not material: otherwise, if he had given day to the son. *Sed non allocatur*; for by *GAWDY* laying all the matter together, that the father required it upon the request of the son, and the other giving day, it is good; and a recovery in this action shall be a good bar in debt upon the bond against the son.—And to this THE COURT agreed, and the plaintiff had judgment.—*NOTA.* *Trin.* 37. *Eliz.* in the exchequer-chamber this judgment was reversed, for it was no consideration.

Assumpsit cannot be maintained against a father, on a promise to pay in consideration of forbearing to sue a bond against his son, altho' the promise be made at the son's request. *Ante*, 207. 240. *Sed vide Cowp.* 128. *contra.*

Hassall against Juxon.

CASE 6.

TRESPASS for breaking a house in such a parish and ward in *London*. Upon not guilty the jury found the trespass, and that the house was in the parish, but not in the ward.—And it was held that this verdict is for the plaintiff; for the finding it was not in the ward is superfluous, it being admitted by the parties; and the jury had not to meddle with it: and it was adjudged for the plaintiff. (a).

The jury need not find the ward in which trespass is laid. *Ante*, 41. *Post*, 333. *Dyer*, 147. 2. Co. 4. 1. *Stra.* 595. 5. *Bac. Ab.* 315.

(a) *Aliter* in ejectment. *L. C. B. PARKER'S MSS.*

Allens against Andrews.

CASE 7.

Hilary Term, 34. Eliz. Roll 720.

THE plaintiff had brought debt as administrator to *Geo. Warlow*, by reason of administration committed to him by the archbishop of *Canterbury* against the defendant, and had judgment to recover; and after the year brought a *scire facias* upon the judgment. The defendant pleaded, that the intestate died in *London*, and had not *bona notabilia* in divers dioceses; and that after the judgment, the bishop of *London* committed administration to the wife: and upon this it was demurred.—And *ANDREWS* himself moved, that he might well plead this plea; for it was a matter of *puisse temps*, and he could not plead it before.—But all THE JUSTICES held he came too late. For *POPHAM* said, if the administration had been repealed, he might well avoid the judgment

To a *scire facias* on a judgment, the defendant cannot plead any matter which might have been pleaded to the action. *Post*, 315. 457. 575. 1. *Sid.* 182. 1. *Salk.* 2. 39. 600. *Ld. Ray.* 853. 12. *Mod.* 499. *B. R. H.* 233. *Cowp.* 728.

ALLENS
against
ANDREWS.

CASE 3.

A bad replication cannot be assigned for error after judgment by *nihil dicit*. Ante, 62.

3. Co. 133. b.
1. Term Rep.
40.

ment by this plea, for it was of *puisne temps*. But this was a matter he might have pleaded before, and it is in annulling of the record, which is not sufferable; and the plaintiff had judgment.

Boyer against Jennings.

Easter Term, 33. Eliz. Roll 248. or 348.

ERROR of a judgment in debt in the common pleas, where the defendant pleaded a good bar, and the plaintiff made an ill replication: and the defendant did not rejoin, but judgment was given against him upon a *nihil dicit*; and now he would assign error, for that the replication was ill; so that it appeared upon his own shewing, that he had no cause of action, and then no judgment was to be given for him.—But THE COURT held he could not assign error in it; for judgment being given by *nihil dicit*, it is all one as if no bar or replication had been made; for the Court, without issue or demurrer, shall not adjudge upon the replication: and although it was entered, yet when the defendant doth not rejoin, this is a waiver of all; and if it were in this court, it is never entered until the rejoinder be made. Wherefore the judgment was affirmed. 3. Hen. 6. pl. 41. 38. Hen. 6. pl. 39. 12. Edw. 3. “*Essoign*” 17.

CASE 1.

Flower against Rigden.

Trinity Term, 34. Eliz.—In the Common Pleas.

If the feoffee of a disseisor lets the land pending an assise against the disseisor only, the termor may falsify the recovery. Post. 718.

27. Hen. 3. pl. 7.
21. Hen. 7. pl. 25.
9. Co. 135.
Co. Lit. 46. a.

REPLEVIN. The case was, A disseisor infeoffed a stranger, and after the disseisor brought an assise against the disseisor only; and the feoffee pending the assise let the land to the plaintiff. The disseisor pleads to the assise *nul tort, nul disseisin, &c.* and found against him; whereupon the disseisor recovered. The question was, If the termor for years shall falsify his recovery? that is to say, that the defendant in the assise *ne disseise pas*?—And it was agreed by THE COURT, that he might: for the termor here did not claim by him against whom the recovery was had; and there is no doubt that the freehold, out of which the term is derived, is not recovered, and the freehold is not bound by it. And the doubt at common law (a) was, if the termor might falsify where the recovery was against the lessor; but it was never doubted, but that where a recovery is not against the reversioner, but against a stranger which had nothing in the land, but that the lessee might falsify in point tried; and so is 1. Hen. 7. pl. 19. And it is a rule, that every stranger to a recovery may falsify (for he cannot have error or attain), if he came not in pending the writ, by him against whom the recovery was, for then he is bound.—And afterwards it was so adjudged, that he might falsify in the point tried.

(a) See 21. Hen. 8. c. 15.

CASE 2.

Farrar against Johnson.

A fine levied of a feignory or reversion to a use, is executed by 27. Hen. 8. c. 10. Duagl. 774.

THE case was, A *feme* lessee for life, the reversion to two coparceners, the *feme* and one of the coparceners make a lease for years of the whole, rendering ten pounds rent *per annum* to the *feme* during her life, and after ten pounds to the said coparcener. Afterwards the *feme* and the two coparceners join in a fine, *sur convenances de droit come ceo, &c.* to two strangers, to the use of Farrar, the

the husband of the coparcener that joined in the lease. Two questions were moved.—First, If he in the reversion levy a fine to the use of himself, if attornment be needful? And resolved it was not; for he is in by the 27. Hen. 8. c. 10. So in every case of a fine levied of a feignory, or of a reversion to an use.—Second, If by this joining in the fine by tenant for life with the reversion, if the estate for life be surrendered, and the rent extinct, because the reversion to which the rent was incident is gone? THE COURT doubted, but inclined it was not; for every one granted what in him lay.—PERIAM said, if they had not levied a fine, and tenant for life died, the lease was good but for a moiety of the parcener that let, yet the rent remained for all.

FARRAR
against
JOHNSON.

Co. Lit. 309b.
6. Rep. 68.
Cro. Jac. 193.

Edwards' Case.

Trinity Term, 34. Eliz. In the Exchequer Chamber.

CASE I.

ACTION upon the case. For that the plaintiff having a cellar, in which he put divers hogsheds of wine, and the defendant having a warehouse over the cellar, maliciously laid into the warehouse such a weight of wares, *quod propter gravitatem ponderis* the floor of the warehouse fell down and spoiled all his wines, by which, &c. The defendant pleaded, that *J. S* was possessed of the warehouse, and of the cellar; and let the cellar to the plaintiff, and the warehouse to the defendant; and that at the time of the lease made, the warehouse was much in decay and ruinous; and that there used to be laid in the warehouse a thousand weight, and that he put in it but eight hundred weight, *et propter ruinositatem* it fell down; and concluded his plea, *et hoc paratus est verificare*. Upon this it was demurred in law. And the principal cause of the demurrer was, for that the plaintiff laid to the defendant's charge, that he *malitiosè* did overcharge the warehouse with wares, and that it fell *propter gravitatem ponderis*; and the defendant answered, that it was ruinous, and fell *propter ruinositatem*, and did not traverse that which was laid to his charge.—And this case was argued by ATKINSON and FLEMING for the plaintiff, and by COKE and DALTON for the defendant.—And after several arguments at the bar, GENT and CLARK, Barons, held strongly, that the plea was not good for want of a traverse; for when a *malfeasance* is laid to the defendant's charge, he ought expressly to traverse it, and not to answer it by argument.—But MANWOOD, Chief Baron, held strongly the contrary, that the plea was good; for he confessed that it fell, but shewed how: as in waste, the defendant pleads that it was ruinous at the time, without answering expressly to the waste. So in an action upon the case against an inn-keeper, it is a good plea, that the plaintiff was robbed by one who came in company with him, without traversing that it was by his default.—But it was answered, that no *malfeasance* is expressly supposed by these acts, but only a permission. But here an ill act is expressly supposed, which ought expressly to be traversed. And the two Barons said, that so was the opinion of the other Judges, with whom they had conferred; wherefore, against the opinion of MANWOOD, they gave judgment for the plaintiff.

In an action on the case, that the defendant overcharged a warehouse by means whereof it fell, if he pleads that it was ruinous, and therefore it fell, he must traverse that it was overcharged.

See Calye's Case,
8. Co. 33. a.
and Fitz. iii.
Hostler, 3, 2.

Highgate

CASE 2.

Highgate against Diggs.

Trinity Term, 34. Eliz.

An imperfection
in a bill is not
helped by a ver-
dict.

Ante, 119.

Sed vide

Hob. 264.

Jones, 304.

contra.

1. Co. Dig. 319.

ERROR assigned was, That Diggs had brought a writ of covenant, and declared upon an indenture; but in the bill upon the file, there was no date of the indenture, but spaces left for it; but the declaration was perfect and compleat: and for that the bill upon the file is as an original writ, which is the warrant for the declaration, and this not being perfect, the declaration cannot aid it.—For this cause the judgment was reversed. And they said, if there be no bill upon the file, this is a plain cause of reversal, and that they had so adjudged it. And so it is here as if there were no bill. Wherefore, &c.

See 18. Eliz. c. 14. 21. Jac. 1. c. 13. 16. & 17. Car. 2. c. 8. 4. & 5. Ann. c. 16. 5. Geo. 1. c. 13.

CASE 3.

Rawson against Maynard.

Ejectment upon
a demise of the
fourth part of a
house is good,
tho' it say he
entered *tenementis
in prædictis*.

Ante, 234.

Running's

Eject. 97.

1. Term Rep.

21.

ERROR of a judgment in the queen's bench. The error assigned was, That in an *ejectione firmæ* the plaintiff did count of a lease of one-fourth part of a house in N. in four parts to be divided; by force of which he entered *in tenementa prædicta*, and was *inde possessionatus*, until the defendant did eject him *de tenementis prædictis*; whereas he ought to suppose his entry into the fourth part, and the ejectment of the fourth part.—*Sed non allocatur*: for THE JUSTICES said, that the entry and ejectment supposed *de tenementis prædictis* shall not be intended of the entire tenement, but of the fourth part of the house, according to his declaration: and the judgment was affirmed.

CASE 10.

Jernengham and Cornwallis.

Trinity Term, 34. Eliz.—In the Court of Wards.

A devise of
three manors
in capite, two
in fee, and a
third in tail, is
good for those
in fee. See

22. Car. 2. c. 24.

Powel on Dev.
216.

THE case was, A man was seised of three manors, of two in fee, and of the third in tail, all being held *in capite*; and he devised all of them to a stranger. The question was, For how much this devise was good?—This was referred to the two *Chief Justices*; and they conceived it was good for the whole two manors which he held in fee, and void for the third; for he being tenant in tail of the third manor, and that descending to his issue, is a sufficient performance of the statute of 32. Hen. 8. c. 7. and the intent of it is satisfied.

Michaelmas

Michaelmas Term,

34. & 35. Eliz. In the Queen's Bench.

*Sir John Popham, Knt. Chief Justice.**Sir Thomas Gawdy, Knt.**Edward Fenner, Esq.**John Clench, Esq.**Sir Thomas Egerton, Knt. Attorney General.**Sir Edward Coke, Knt. Solicitor General.*} *Justices.*

Beal against Charter.

CASE 1.

TRESPASS for false imprisonment. The defendant justified as constable of *A.* because the plaintiff brought a child of the age of two months, and laid it in the church-yard of *A.* to the intent to have destroyed it, or to charge the parish with the keeping of it; for which he did arrest him, and put him in the stocks; for which, &c.—And upon this, it being demurred, it was held a good justification, for it is an ill practice, and is good cause to stay the plaintiff, and to imprison him. And afterwards in the same term it was adjudged, that the plaintiff *nihil capiat per billam.*

The dereliction of a child is an offence for which a constable may justify imprisoning the offender in the stocks.

Ante, 204.

Poph. 12.

Moor, 284.

Owen, 98.

1. Leon. 327.

Grute against Locroft.

CASE 2.

Easter Term, 33. Eliz. Roll 211.

TRESPASS. Upon demurrer the case was, *Baron and feme* jointenants during the coverture for sixty years; the *baron* by indenture let all the land for seventy years, to commence immediately after his death; the *baron* dieth, and the *feme* survived. The question upon demurrer was, If this be a good lease to charge the possession of the *feme*?

A husband may make a lease of lands held in joint-tenancy with his wife, to commence after his death; and it will be good, though the wife survive.

Ante, 152.

Co. Lit. 466.

1. Co. 155. 2.

Moor, 395.

Poph. 4.

3. Bac. Abr.

308.

1. Wood's Con.

171.

Cowper, 201.

Douglass, 53.

It was first moved that it was a void lease, because it was not to commence till after the death of the *baron*; and it might be that he might overlive the whole term: and it is all one as if he had granted the term to commence after his death, which had been void.

Second point, He dying before the term commenced, the interest is vested in the *feme*.

But it was adjudged a good lease. For as to the first, it is not like the case put, for there nothing passed until his death; but here a good term is created in interest, although not in possession.

For the second point, the *baron* having an interest to dispose of in his life, he might dispose of all the term, and it should bind the *feme*: so when he hath disposed by an act executed in his life of the interest of the term, and hath created a term in interest, this is as good as if he had granted all the term. And so it was adjudged. 1. Co. 155. 2.

Martidale

CASE 3.

Martidale against Martin.

A devise of lands "upon trust and confidence, that out of the profits the devisee should erect a free-school," is not restrained by 23. Hen. 8. c. 10. nor do these words create a condition.

1. Co 25. b.
2. Leon. 154. Moor, 594. Bendl. 287. Poph. 8.
1. Bro. Caf. Ch. 13. 61. 81. 371. 444.

2. Leon. 33.
1. And. 139. Poph. 8.

EJECTIONE FIRMÆ, by the lessee of *Sir Edw. Clere* against the lessee of *Peacock*, for certain lands in *Thetford*.—Upon special verdict the case was, An ancestor of *Sir Ed. Clere* devised certain land to divers and their heirs (under whom *Peacock* claimed) to the use of them and their heirs, upon this trust and confidence, that they out of the profits of it should erect a free-school, and pay so much to the master yearly, and so much to the usher, and should give ten pounds *per annum* to five poor men; and it was found, that the land was not so employed, nor any school erected, &c. and, If this were a condition for breach whereof *Sir Ed. Clere* might enter? was the question.—There were two points in the case. First, If these uses were void by the 23. Hen. 8. c. 10.? Secondly, If it were a condition?—After argument, all THE JUSTICES held, First, That it was not restrained by the 23. Hen. 8. c. 10. for that was only to restrain superstitious uses, and never intended to restrain uses that were in favour of learning, and relief of the poor. *Vide 1. Co. Porter's Case*. Secondly, They resolved it was no condition; for the words being upon trust and confidence, shew that he reposed trust in them, and would not have the land return for non-performance of it; and there can be no more apt words to shew his intent, and not to tie the land with a condition.

POPHAM cited *Machin's Case* (which was entered *Mich. 29. & 30. Eliz. Roll 649.*) where the lessor devised his land to his lessee for years, for the same term he had before, and paying the same rent, and at the same days and upon the same covenants which were in the first lease. And the question was, If this were a lease conditional, that his lease should cease if he did not perform the covenants? And adjudged it was not; for the first covenants were only by way of covenant, and not conditional. And here it cannot be by way of covenant; and therefore the devise as to that was void, and stood for the residue.—And afterwards it was adjudged for the lessee of *Peacock*.

CASE 4.

Justice Fenner against Fisher.

Trespass may be maintained without shewing title; and therefore, though the plea confesses and avoids the plaintiff's title, it is sufficient if the replication traverses, or denies the matter alleged by the defendant. Ante, 64. Post, 395. 671. 754. 798.

TRESPASS. The defendant justified, for that *Jo. Wright* was seised in fee, and let to him for years; that the plaintiff, claiming by colour of a deed of feoffment, where nothing passed, entered, &c. The plaintiff replieth, by protestation, that *Wright* was not seised in fee; *pro placito* saith *quod non demisit*. Upon this issue was joined, and found for the plaintiff. It was now moved in arrest of judgment, that the plaintiff hath not made any title to himself in his replication.—But all THE JUSTICES held it good enough; for in this action a man need not make any title to himself; but otherwise in an assise, or other real action. Also by the defendant's plea, that the plaintiff entered by colour of a deed of feoffment, in that he doth admit him to be tenant at will, which is not destroyed. And it was adjudged for the plaintiff. *V. 18. Edw. 4. 26. 3. Ed. 4. 18. 22. Edw. 4. "Trespas"* 140. 6. Co. 24. a. Cro. Jac. 19. Fost. 378. Stra. 1238.

Appleton

Appleton *against* Burr.

CASE 5.

ERROR of a judgment in the common pleas, in an action upon the case against the plaintiff, sheriff of E. for suffering a prisoner to escape who was arrested by a *capias* upon an original writ.

A declaration for an escape, need not shew where the prisoner was delivered, nor allege non-appearance at the return of the writ.

S. C. ante, 158.

FIRST ERROR, It was alledged, that the sheriff directed his warrant to the bailiff of the franchise to arrest him, who arrested him, and delivered him to the under-sheriff *in eâ parte autorizat'*, &c. and shewed no place where the bailiff delivered the prisoner, for it may be it was out of the county.

SECOND ERROR. It was not shewn, that the prisoner did not appear at the day; and if he did appear, the plaintiff was at no loss.—*Sed non allocatur*; for the shewing of the place was but an inducement to the action; and when he pleaded not guilty, the escape is the matter material: and to the second, though he did appear, yet the *tort* is not purged. And the judgment was affirmed.

Charnock *against* Sherrington.

CASE 6.

ERROR. For that *Sherrington* recovered against one *Worsely* in debt, and afterwards *Worsely* enfeoffed the plaintiff of his land; and then *Sherrington* sued an *elegit* upon the judgment; and the plaintiff before execution made, sued this writ of error, and would assign error in the judgment. And it was demurred in law if the writ did lie.—**CURIA**. It seemeth it did not. First, That the feoffee cannot have a writ of error, except it be for error in suing the execution. Secondly, Till execution sued, he is not a party grieved; and this was the reason that he in the reversion or remainder shall not have error in the life of the *tenant for life*, upon a judgment given against the tenant for life, because he was not a party grieved; but he might have it after the death of the tenant for life, before the statute.—But **EGERTON** strongly urged the contrary, because the land is liable to the execution. *Vide* 18. *Edw.* 3. 25. 4. *Dyer*, 1. 2. *Edw.* 4. 24. *Post.* 294.

A man enfeoffed after judgment had against the feoffor, cannot have a writ of error, until he is aggrieved by the execution.

3. Co. 4. 2.

Post. 294.

Graves' Case.

CASE 7.

ACTION FOR WORDS: "Mr. *Wingfield*, you never thought "well of me since *Graves* did steal my lamb."—Adjudged actionable; although it was alledged in arrest of judgment, that it was not a direct affirmance that *Graves* did steal it.

Words actionable.

Lever's Case.

CASE 8.

ACTION FOR WORDS. And declared, That the plaintiff was an *inn-holder* in D. The defendant spake these words: "Thy house is infected with the pox, and thy wife was laid of the pox."—Adjudged actionable; for it shall be intended the great pox; and if it were the small-pox, yet they were actionable; for it is a discredit to the plaintiff, and guests would not resort thither. And it was adjudged for the plaintiff, and fifty pounds damages given.

Words actionable.

Ante, 214.

Post. 582.

4. Co. 17. 2.

CASE 9.

Baxter and his Wife *against* Mounting.

If a *feme* cognator being named in the writ, be omitted to be named in the summons, the whole fine shall be reversed. Ante, 124.

ERROR to reverse a fine. The error assigned was, That the *baron* and *feme* and the third person levied the fine, and the writ of covenant was against the *baron* and *feme* and the third person; and in the summons the *feme* was left out.—**COKE** moved, that for this error the whole fine shall be reversed; and it being ill in part, is ill in all. 2. *Edw. 3. pl. 39.* 27. *Hen. 6. pl. 6.* 10. *Edw. 3. pl. 1. 50.*—And so was the opinion of **THE COURT**: but they would advise.

CASE 10.

Warneford *against* Haddock.

Michaelmas Term, 33. & 34. Eliz. Roll 47.

A person who has two parts of the reversion of a house may bring waste, though the defendant holds by several titles; and if default is made after appearance, it is a confession of the waste, and the enquiry shall be of the damages only.

Ante, 234.

Owen, 11.
Poph. 24.
Co. Lit. 53.
3. Bl. Com.
229.

ERROR to reverse a judgment in an action of waste.

FIRST ERROR. In the action of waste the defendant appeared upon the distress, and after declaration made no answer, but judgment was given against him by *nihil dicit*: and upon the writ awarded to inquire of the waste and damages, the sheriff went not to the place wasted, but inquired of it at another place; and this was assigned for error.—*Sed non allocatur*; for when judgment in waste is given upon a demurrer or *nihil dicit* the waste is confessed, and the writ shall be only to inquire of damages; and although the writ do command the sheriff to go to the place, this is but of form and nugation; but otherwise it is where judgment is given by default before appearance: so is 3. *Eliz. Dyer, 204.*

SECOND ERROR. He assigned the waste in a house, and by his title it appeared the plaintiff had only two parts of the reversion of the house.—*Sed non allocatur*; for although he hath but two parts, yet he shall punish the defendant for waste done in that which was held of the plaintiff; and the messuage being entire, he cannot assign the waste otherwise; and he did count according to his title.

THIRD ERROR. Because it did appear the defendant had the two parts by several demises; and therefore, though the plaintiff had the reversion in one hand, yet he ought to have several actions.—*Sed non allocatur*: for he having counted upon the whole matter, it is as several counts; and he may well join them in one action.

In *Easter Term, 35. Eliz.* the case was moved again; for that it doth appear by the count, that the defendant held one part of the demise of the plaintiff, and the other of the demise of a stranger, which had granted his reversion to the plaintiff; so as he had the reversion by several titles, he cannot maintain this action. And although he hath declared specially how he held it, *ex dimissione & assignatione*, this will not aid him; but if he had made several leases he might have had one action of waste, as 44. *Edw. 3. is.*—But **ALL THE JUSTICES** held the contrary; for inasmuch as he hath shewn the truth of his case in his declaration, and he hath the reversion in one hand, he shall maintain this action.

FOURTH ERROR. That the sheriff had taken an inquest to inquire of the waste; whereas the judgment being by confession, it ought not to be inquired.—But because divers precedents were so, it was awarded no error. And the judgment was affirmed.

Note. In this term died **SIR ROGER MANWOOD**, Chief Baron; and he was succeeded by **SIR WILLIAM PERIAM, Knt.** one of the Judges of the Common Pleas.

Hilary

35. Eliz. In the Queen's Bench.

Sir John Popham, *Knt.* Chief Justice.

Sir Francis Gawdy, *Knt.*

Edward Fenner, *Esq.*

John Clench, *Esq.*

} Justices.

Sir Thomas Egerton, *Knt.* Attorney General.

Sir Edward Coke, *Knt.* Solicitor General.

Sharley against Richardon.

CASE 1.

Hilary Term, 34. Eliz. Roll 462.

DEBT upon an obligation of 50l. The condition was, To perform the arbitrament of *Walter Bolton* and *Edw. Price* of all actions, &c. The defendant pleaded they made no arbitrament. The plaintiff by replication shewed that they made an award, *scilicet*, that each of them should give to the other, within four days after the award, a general release of all demands till the date of the obligation: *proviso semper*, that if either of them disliked the award within twenty days after the award, and should pay to the other, within the said twenty days, ten shillings, that then the arbitrament should be void, and it should be lawful for them to sue their actions, &c. one against the other. Upon this it was demurred; and argued by *TANFIELD* of the one part, and *LEWIS* of the other.—And after argument it was adjudged for the plaintiff. For all THE JUSTICES held, that the first part of the award was good; and the *proviso* being repugnant and contrariant to the premises, is wholly void; and for the non-performance of that part which was good, the action did lie: for when they awarded that they should release each to the other within four days, by non-performance of it the bond was forfeited: then the *proviso*, that upon payment of ten shillings all should be void, this cannot save the bond, which was before forfeited: and when one hath released to the other; the other, if the *proviso* be good, might tender the ten shillings to make the arbitrament void, which would not avoid the release. And it was adjudged for the plaintiff.

An award of general releases, with a *proviso* that the award should be void if the parties disliked it in 20 days, is good for the first part, though the *proviso* is void.

S. C. Poph. 15.
1. Sid. 59.

Ridler against Punter.

CASE 2.

EJECTIONE FIRMÆ. It was found upon special verdict, that *W.* and his wife being possessed in right of the wife of a term which she had as administratrix to *C.* her first husband; and *W.* being indebted by contract, granted the term to *Coleman*, to the use of *W.* and his wife for their lives, and after to the use of *Coleman* himself. *W.* is sued for this debt, and recovery against him; and a *feri facias* being awarded to the sheriff, he for this debt of *W.* sold the term to the plaintiff. The question was, If

Fraudulent grant.
3. H. 7. c. 4.
1. Hale, 248.
Cro. Jac. 512.
Hob. 214.
1. Hale, 248.
10. Co. 15. b.
Post. 816.

See 2. Com. Dig. title "Covin,"
this

RIPLER
against
PUNTEE.

this sale were good?—It was moved, that this grant of a term, being but a chattel, and to the use of the grantor himself, is void by the statute of 3. Hen. 7. c. 4.

CURIA contra. For the preamble of the statute is, where grants were made by fraud or covin of chattels to the use of the grantors themselves, to defraud creditors or others, that they shall be void; but this grant is not to avoid creditors: for the term being in right of the wife as administratrix, if it had so continued in the hand of *W.* and had never been granted, this was not extendible for the debt of *W.*; and if *W.* himself had it as executor, it was not extendible for his proper debt; and fraud shall not be intended, except it be expressly found. And this grant is out of the statute of 39. Hen. 7. c. 4. and all other statutes of that nature. Wherefore, &c.

See 13. Eliz. c. 5. and 27. Eliz. c. 4.

CASE 3.

East against Harding.

It is a cause of forfeiture for a copyholder to cut trees without a custom to support it.

Sed quære, if it be for reparation?

Ante, 5.

Post, 499.

TRESPASS for cutting of trees. The question was, If it be a forfeiture by the common law for a copyholder to cut trees, without a special custom for it?—*GAWDY* and *POPHAM* held it was, for it is to the lord's disinheritor; and is not allowable for a copyholder to do it without a custom; and if he did it, it was a forfeiture.—But by *POPHAM*, if it be found that he did it for reparation of the house, by which it is made better, there, peradventure, it is otherwise.

1. Roll. Abr. 508. Gilb. Ten. 237. 2. Term Rep. 746.

CASE 4.

Gregory against Nevill.

A declaration on a promise in consideration of relinquishing a rent, must shew that the relinquishment was by deed.

ASSUMPSIT. That whereas *M.* the lessee for life of land, the reversion to the defendant, had granted to the plaintiff a rent of ten pounds out of it; in consideration that the plaintiff promised to relinquish the rent, the defendant promised to pay him thirty pounds; and alledged in fact, that he did relinquish the rent, and did not claim it, &c. Upon *non assumpsit* it was found for the plaintiff.—And upon motion in arrest of judgment, it was resolved, that the declaration was not good, because he shewed not how he relinquished the rent; for it might be by words, which was no discharge.

CASE 5.

Bagnal against Sacheverell.

If a verdict find a different *assumpsit* than that stated, it is bad.

Ante, 133-147.

Co. Lit. 217.

Str. 844 887.

1089

Comp. 766.

Dougl. 666.

1. Term Rep.

2. 477.

ASSUMPSIT. For that whereas the defendant was indebted to him in 50l. he promised to pay it. The jury found, that *quoad* 47l. parcel of the said 50l. he did assume to pay it, &c. *quoad residuum* "*non assumpsit*." It was moved, If upon this verdict the plaintiff should have judgment?—And resolved he should not, because it was found that he did assume only for part, so the same *assumpsit* was not found that the plaintiff did declare upon; and although it was upon an *indebitatus assumpsit*, it would not alter the case (a).

(a) But it is now holden, that as the promise upon which an *assumpsit* is founded, cannot extend further than what is justly due; the jury, in assessing damages, may divide them

in such a manner that the plaintiff may recover what is justly due. *Thompson v. Spencer*, East. 8. Geo. 3. in K. B.

Nedham

Nedham *against* S. Corfellis, an Alien.

CASE 6.

ACTION FOR WORDS. For that whereas *J. Clerke* brought an *assumpsit* against the defendant; and they being at issue upon it, the plaintiff being produced as a witness at the trial at Guildhall before *WRAY, Chief Justice*, for *Clerke*, and upon his oath gave evidence to the jury; the defendant *super hoc* immediately said, "Thou hast forsworn thyself," *innuendo* "in the said oath." Upon this declaration the defendant demurred.—And it was adjudged that the action lay upon these circumstances; for it was *super hoc immediatè*, &c. after he took the oath, and it is *innuendo* the said oath.

A writ of enquiry of damages was awarded.—And it was held that upon this writ the inquest shall be all of *English*, and *no* part of aliens, for it is out of the statute. 28. *Edw. 3. c. 13.*

The jury shall be all English upon a writ of enquiry against an alien.

Sherwood *against* Winchcomb.

CASE 7.

PROHIBITION. The plaintiff declared, That whereas king *Henry the eighth* was seised of the manor of *D.* of which a portion of tithes of such a place was parcel time out of mind, &c. conveyed it to him, and he was impleaded in the court christian for these tithes, &c. Upon this declaration it was demurred; for tithes cannot be parcel of a manor; for they are things spiritual, for which at common law a common person cannot sue; and being of a distinct nature, cannot belong to a manor. 10. *Edw. 3. pl. 5. 9. Hen. 7. pl. 46. Edw. 3. cattalla felonum* cannot be parcel of a manor; and although the king may have tithes, yet he hath them not as a lay fee.—And of that opinion were all THE JUDGES, that he cannot prescribe for tithes as parcel of a manor; but if he had prescribed to have *decimam partem granorum*, this had been good, but not *portionem decimarum*. And a consultation was granted. *Vide 2. Co. 45. b.*

Tithes cannot be prescribed for as parcel of a manor. Post. 413. 599. 763. 814.

1. Ro. Ab. 428. Micor. 355. Hob. 296. 11. Co. 13. 1. Saund. 142. 2. Co. 45. 5. Bac. Ab. 37.

Scavage *against* Beauchamp.

CASE 8.

ACTION upon the case, by a sheriff against the defendant, because he was a prisoner and in execution, *et violenter* escaped. The defendant pleaded, that before the time of the escape the under-sheriff (a) carried him out of the prison to such a place, which was out of the jurisdiction, and afterwards brought him back again, and there he remained till the time of the escape supposed, and then he went out, as it was lawful for him. Upon this it was demurred in law.

A sheriff may bring an action against a prisoner for having escaped; *sed quæritur*, if he has been carried by the under sheriff out of the jurisdiction. Ante, 53.

First, It was moved, that an action did not lie for the sheriff against a prisoner for an escape, for he ought to keep his prison at his peril.

Moor, 597. 2. Term Rep. 5. 126.

CURIA contra. And so it was ruled in *Holt v. Hill*; for the prisoner by law is to remain in the place whereto he is committed. And as to the matter, THE JUSTICES conceived, if the prisoner be once by the act of the under-sheriff carried out of prison to another place out of his jurisdiction, although he be brought again to the prison, he is not in execution, and need not tarry: but they would advise.

(a) Gaoler. L. C. B. PARKER'S MSS.

CASE 9.

Levett *against* Farrar.

A writ on the statute of *Northampton*, directed to the sheriff by his name of office, may be executed by the under-sheriff.

FALSE IMPRISONMENT. The defendant justified, for that a writ upon the statute of *Northampton*, 2. *Edw.* 3. c. 4. was awarded 30th *July*, 32. *Eliz.* to the sheriff, and to the justices of the peace of the county of *Norfolk*, to remove a force; and he being under-sheriff, by the commandment of the sheriff went to the places, and found the force; and because he was not able to remove it, he made proclamation that every one should depart and leave their weapons, &c. And afterwards he enquired of the force; and it being found that the defendant was one of them that made the force, the defendant 6th *August*, afterwards by virtue of the said writ did arrest him, and committed him to prison; and so justifieth.

Post. 440.

1. Hawk. 267.

Upon this the plaintiff demurred. First, Because this is a commission to the sheriff, which the under-sheriff cannot execute. Secondly, He ought to commit him at the same time when the force was done; and cannot arrest him afterwards, when the force is ended. Thirdly, Because it is not averred that he was under-sheriff at the time of the arrest.

But THE COURT, notwithstanding these and other exceptions, held the plea good. For when it is directed to the sheriff by the name of his office, and not by a particular name, nor doth expressly command him to do it in person, the under-sheriff may do it, for it is a writ grounded upon the statute; and not a commission, for then it had been otherwise. Secondly, The arrest is lawful at another time; for if the force had been removed before his coming, yet if by enquiry it be found that a force was done, and who did it, he may arrest them at another time; and it is not like the statute, that the auditors may commit the accountant, for there he is before them. Thirdly, It shall be intended he continued under-sheriff, when in the same plea it is alledged he was under-sheriff, and the contrary is not shewn. And it was adjudged for the defendant.

CASE 1.

Scroggs *against* the Lord Mordant.

Hilary Term, 35. Eliz. In the Exchequer Chamber.

An administrator may sue a writ of error, although the execution was against the testator by *elegit*.
Ante, 289.
Cro. Car. 142.
1. Ro. Ab. 749.
11. Co. 112.
Palm. 254.
6. Co. 80 a.

THE plaintiff, as administrator of *Bridges*, brought a writ of error to reverse a judgment in *scandalis magnatum* in the queen's bench.

FIRST, The defendant alledged, that the writ of error lieth not; for this writ of error is given by the 27. *Eliz.* c. 8. and the statute is; that "the party, plaintiff or defendant, shall have a writ of error;" but speaketh not of the heir, executor, or administrator.

SECONDLY, That execution was sued against the testator by *elegit*, and the lands only were extended; but no goods delivered in execution, so the administrator had no loss: and when he had no loss, he cannot be restored to any thing.

But

But THE COURT resolved for both points, that the writ of error did well lie. For as to the first, it is within the intent of the statutes (a), for which the statute (b) did provide. And as to the second, he is privy to the record; and may have loss by it *in futuro*. And in many cases he that hath no loss, nor can have loss, may maintain a writ of error; as the tenant which makes a feoffment pending the writ against him. So in trespass against two, and execution of the damages is had against one only, and the plaintiff is satisfied, and he against whom the execution was, died, yet the survivor may sue a writ of error; and for this point 20. *Edw. 3.* was cited. Whereupon it was awarded that the writ did lie; and that the defendant should answer. *Vide 6. Co. 80.* —NOTA ALSO, that it may be that the execution of the land may be avoided, and then the administrator may be damnified.

SCROGGS
against
LORD
MORANT.

- (a) *Westm. 1. 3. Edw. 1. c. 34. 2. Rich. 2. c. 5. 12. Rich. 2. c. 17*
(b) *27. Eliz. c. 8.*

Easter Term.

35. Eliz. In the Queen's Bench.

Sir John Popham, *Knt.* Chief Justice.Sir Francis Gawdy, *Knt.*John Clench, *Esq.*Edward Fenner, *Esq.*

} Justices.

Sir Thomas Egerton, *Knt.* Attorney General.Sir Edward Coke, *Knt.* Solicitor General.

CASE 1.

Munday against Cordal.

Hilary Term, 35. Eliz. Roll 60.

Words actionable.

Cro. Car. 326.
1. Hawk. P. C.
338.
2. Eac. Ab. 568.

ACTION for these words: "Thou art a forger, and art sued in the star-chamber for going by one *Sedge*." It was after verdict moved in arrest of judgment, that an action did not lie for those words; for it is not shewn what thing he forged, and how he was sued, for it might be, it was without cause. —But THE COURT gave judgment for the plaintiff; for when he said, "Thou art a forger," this is intended of such a thing of which forgery might be, and to be spoken in the worse part; and when he said, "he is sued in the star-chamber," this doth aggravate it, that he did such a forgery for which he is suable there.

CASE 2.

Barley's Case.

Autrefois convict of man-slaughter in an appeal of murder, is a good plea to an indictment for the same offence.

2. Hawk. P. C.
535. 536. and
the cases there
cited.

(a) Ante, 276.

HE was indicted for the murder of *Weatherhead*. On being arraigned upon it, he pleaded, that *Ann* the wife of *Weatherhead* brought an appeal against him for this murder; and he was arraigned upon it, and pleaded not guilty; and tried, and found by the jury that he was not guilty of murder, but that he was guilty of man-slaughter; and thereupon he prayed his clergy, and had it; and demands judgment, if he shall be again put to answer this felony. Thereupon it was demurred.—And now this term it was judged a good plea; and thereupon he was openly in court discharged, but no special reason was given of the judgment. *Quere*, for the finding him guilty of man-slaughter in the appeal was more than needed, as it appeareth in *Wroth v. Wiggs* (a), and then the allowance of clergy is to no purpose, &c.

CASE 3.

More against More and his Wife.

Damages must be severally assessed, where the defendants are severally guilty.
Co. 10. 131. 2.
Doug. 377. 730.

ACTION for words against the *baron* and *feme*, for words spoken by the *feme*, and also for words spoken by the *baron*. The defendants did confess the action; and upon a writ of enquiry of damages, the damages were entirely assessed.—And it was held ill, and for this cause the judgment was stayed; for the damages ought to be severally assessed for the several words. *Vide* 9. Edw. 4. f. Green

Green *against* Dancy.

CASE 4.

ACTION for these words: "Thou art falsly forsworn in *Bell-*
"court," *innuendo*, a court baron held at *Bell*.—And **PER**
CURIAM, with this *innuendo* the action did lie, otherwise not.

Words not
actionable.
Ante, 135.
Post. 209. 348.

Lee *against* Secombe.

CASE 5.

ACTION for these words: "He was falsly forsworn in the
"court of the *Bishop of Exon*, at *Exon*." It was moved in
arrest of judgment, that it doth not appear he was sworn in any
judicial court; for it may be in the yard of the bishop, which is
called his court.—**FENNER**, *Justice*. It is known to us that every
bishop hath his court, that is, his consistory to determine causes;
and it shall be intended he was forsworn there.—The plaintiff had
judgment.

Words action-
able.
Ante, 183.

1. Hawk. P. C.
c. 69. f. 3.
4. Bac. Abr.
499.

Levermore *against* Martin.

CASE 6.

ACTION for these words: "Thou art forsworn and perjured."
The jury found a special verdict, That the defendant said
the plaintiff was "a forsworn fellow." To whom the plaintiff
said, "Will you say I am perjured?" The defendant said, "Yes,
"if you will have it."—**THE COURT** conceived, that upon this
matter an action did not lie: and it was adjudged for the defendant.

In slander the
words must be
proved as they
are laid.

Butler *against* Paynter.

CASE 7.

ACTION FOR WORDS. For that whereas the plaintiff
was a justice of the peace, the defendant said, "You do
"openly maintain and countenance the worst people, against
"God's laws and the queen's." After verdict it was moved, that
an action did not lie for these words; for it is not shewn who
these people are which he intended were the worst people, *viz.*
rogues, hereticks, or the like; and it is not shewn that he did know
them to be such persons, nor in what he did maintain them.—And
of that opinion were **FENNER** and **CLENCII**.—But **POPHAM**,
Chief Justice, contra; for they found to his discredit. And he said,
it was adjudged upon good deliberation, in a case between *Sir Hen.*
Portman and *Stowell*, that for these words, "Thou maintainest
"such a suit," an action did lie, for maintenance is unlawful and
odious, and it is here alledged to be spoken *malitiosè*, and cannot
be intended but he maintained them in their naughtiness.—After-
wards, *Mich. 35. & 36. Eliz.* the case was moved again: and it was
held by **THE WHOLE COURT** that the action did not lie, for the
words are too general to maintain an action.

Words of too
general an im-
port will not
support an ac-
tion of slander.
Yelv. ar.

More *against* Roswell.

CASE 8.

Hilary Term, 35. Eliz. Roll 22.

DEBT upon an obligation. The condition was, to perform
covenants of such an indenture; and the breach assigned in
this, that the defendant did covenant to assure such land by such
assurance as by the counsel of the plaintiff should be devised; and
alledged, that the plaintiff caused such an assurance to be drawn

A covenant to
execute such a
deed as a par-
ticular counsel
shall advise, is
not broken by
refusing to exe-

cute a deed drawn by the party, *Post. 465. 5. Co. 19. b. 1. Roll. Abr. 466. 2. Com. Dig. 455.*
1. Wood's Con. 288. 306.

and

MORE
against
ROSWELL.

and engrossed, and put wax to it, and required the defendant to execute it, and he refused. Upon this the defendant did demur.

HARRIS, *serjeant*, moved, that no breach of the covenant was shewn; for when he is to make such assurance as the counsel of the plaintiff shall devise, and the plaintiff himself doth devise it; this is no breach, for he is not compellable to make it. 6. *Hen.* 7. *pl.* 4. 26. *Hen.* 8. 17. *Edw.* 4.

GAWDY, *Justice*. This clearly is no breach; for when it is referred to such an assurance as counsel shall advise, this shall be intended such assurance as shall be reasonably advised, and not in such manner as the party himself of his own head shall advise, which peradventure may be unreasonable.

Ante, 9.

(a) Vide post.
465. Clifton
v. Gibbon, *cons.*
(b) Watkins v.
Towers, 2. *Ter.*
Rep. 275.

Afterwards being moved again at another day, all THE COURT was of the same opinion (a), for which the plaintiff would have been non-suited; but he could not, because he appeared the same term (b); and therefore he prayed advisement till the next term, to the intent to be nonsuited, and to discontinue it.

CASE 9.

Stafford against Botborne.
Hilary Term, 35. *Eliz.* Roll 647.

In an *assumpsit*
on a promise to
make such an
assurance as the
plaintiff's coun-
sel should ad-
vise, it is suffi-
cient to state
that the counsel
advised the
plaintiff, and
that the plaintiff
gave notice of it
to the defendant.
Post. 465.

5. *Co.* 19. b.
1. *Lut.* 680.
3. *Mod.* 191.

ASSUMPSIT. For that the defendant, upon such consideration, promised to make to the plaintiff such assurance of the rectory during their joint lives, as shall be devised by the counsel of the plaintiff; and alledged *in facto*, that one *Jo. Morris* was of his counsel, and that he gave his advice that the defendant should make a lease by indenture, &c. and that the plaintiff himself *possea apud L. dedit notitiam* to the defendant of the advice of the said *Jo. Morris*, and required him to perform it, which he had not done.

After verdict GODFREY moved in arrest of judgment, that the counsellor is to give notice of the advice to the defendant, and not to the plaintiff; for perhaps he will not speak it truly; and the defendant is not bound to give credit to his report: and so is 11. *Hen.* 7. *pl.* 21.

COKE *contra*. For being the counsellor of the plaintiff, he is to give his advice to the plaintiff; and he to notify it to the defendant. 11. *Hen.* 7. *pl.* 23. 8. *Edw.* 4. *pl.* 22. 14. *Hen.* 8. *pl.* 21.

And the defendant is not at any mischief, for he is not to do it without notice; and if notice be given, he is to do it at his peril, if it stand with the agreement: and if the plaintiff giveth notice to make such an assurance, and he doth it, although it be not advised by counsel, this shall excuse him; and if the plaintiff shall afterwards say that the counsel advised any other assurance, he need not make it, for the plaintiff is not to vary from his first request.

POPHAM, *Chief Justice*. If the words were, that he shall make such an assurance as the counsel of the plaintiff shall advise the defendant, it is no doubt but the counsel must notify it to the defendant; and if the words were as the counsel of the plaintiff shall advise him, it is no doubt that notice is only to be given to the plaintiff: but the words here are, "as by the counsel of the plaintiff shall be devised," which doth stand indifferent; and he conceived it sufficient to be given to the plaintiff; and he shall give notice thereof to the defendant: for in the performance of every condition, every one is to perform that which

Ante, 9.

lieth

lieth in his notice; and therefore if the promise be, that you shall make such assurance as my counsel shall advise you, I ought to give notice who is of my counsel. It was ruled in a *Wiltshire* case, where one made a lease for years, with a *proviso*, that if he tendered ten shillings at the cathedral church of *Sarum*, at any time during the term, that the lease should be void; he was bound to give notice to the lessee when he would be there to tender, for the time was uncertain. (*Vide* 18. *Eliz. Dyer*, 354.) Another case was ruled, that if one be obliged to another to pay so much to him, when he came next to *Paul's*, he ought to give notice when he would come next thither. So here it is to be expounded with reason, for the counsel of the plaintiff is not bound to travel to seek the defendant; and if he give counsel to the plaintiff, and he give notice to the defendant, this is sufficient, and there is no mischief to the defendant; for if the plaintiff doth report it to him falsely, yet if the defendant doth perform it, it is sufficient, and he cannot vary from it, but hath dispensed with the defendant for any other, and shall not say afterwards that the defendant hath done it according to the advice; and this is the surest way.—Of that opinion were FENNER and CLENCH (*absente* GAWDY); and it was afterwards adjudged for the plaintiff. *Vide* 5. *Co.* 19. b.

STAFFORD
against
BOTTORNE.

Co. 3. 92. a.
Co. Lit. 211. a.

Okes against Kirby.

CASE 10.

ASSUMPSIT, In consideration the plaintiff at the defendant's request would surcease such a suit, &c. the defendant promised to seal him a bond when required, &c. and alledged *in facto* that he did surcease the suit, and the defendant, *licet sapius requisitus*, such a day and place, had not sealed it. After verdict it was alledged in arrest of judgment, First, It is not alledged that he surceased at the request of the defendant.—Secondly, That the request to seal the bond was not by the plaintiff.—*Sed non allocatur*. For as to the first, it shall be intended, for it is for the defendant's benefit: and to the second, it shall be intended, if the contrary be not shewn, that it was by the plaintiff, or by his servant for him, Wherefore it was adjudged for the plaintiff.

An *assumpsit* on a promise to seal a bond in consideration of surceasing a suit, need not all. d. e. that the plaintiff requested the one act to be done, or the defendant the other.

Lewes against Hay.

CASE 11.

Michaelmas Term, 33. & 34. *Eliz.* Roll 448.

ERROR. For that the judgment was, *et idem* JO. LEWES in Amendment, *misericordiâ*; whereas it should be *Thomas Hay*.—It was amended by award.

Bartlett against Wright.

CASE 12.

EJECTIONE FIRMÆ. For a messuage, one rood and two acres of land in *Bridgenorth*, of the lease of *Elburne*. The jury, upon not guilty pleaded, find a special verdict, "that one *Delborough* was seised of the house, and of two yard-land in *B.* and that the two acres of land were time out of mind parcel of the two yard-land; and that the said *D.* let to the said *E.* lessor of the plaintiff, all my house, and two yard-land in *B.* in the possession of *Geffe*; and they found, that the two acres of land were not in the possession of *Geffe*, but that all the residue were."

A demise of two yard land in *B.* in the possession of *G.* will not pass any parcel of the land in *B.* that is not in the possession of *G.*

The

BARTLETT
against
WRIGHT.

Co. 8. 10. 2.

Ante, 39.

Cro. Jac. 22.

1. Com. Dig. 27.

The question was, If the two acres do pass?—It was argued by PUDSEY of the one part, and HERNE of the other.

GAWDY conceived it did pass; for when it is named "my house, and two yard-land in B." this is sufficiently certain, and that which came after is not material; and it is good for all, though no part were in the possession of *Geffe*.—POPHAM accorded. For when the law makes a certainty, that which cometh after and is repugnant is void: as if one grant the manor of *D.* in *D.* and this extends to *D.* and *S.* if he hath demesnes and services in *D.* and *S.* this shall pass only that which is in *D.*; for the words are supplied that a manor passeth; but if he hath demesnes and services only in *D.* then the whole shall pass, for otherwise the grantee shall not have a manor: so here, for that the yard-lands are intire, and he cannot have the yard-land except he have two acres, they shall also pass, and it shall not be restrained by the last clause. So if one hath five acres called *Blacklands*, and he granteth all his acres called *Blacklands* in the tenure of *J. D.* and *J. D.* hath but four of the acres, yet the five shall pass.

Ante, 16.

Post. 474.

CLENCH and FENNER *contra*. For the intent of the parties was to pass only that which was in the tenure of *Geffe*, and yard-land is no such certainty; but when it is referred to another certainty, this shall be good, especially when the grant may be supplied by the land in the tenure of *Geffe*; but if no part were in his tenure, it is otherwise. *Et adjournat*.—And afterwards, in *Easter Term*, 35. *Eliz.* POPHAM being absent, it was again moved; and, against the opinion of GAWDY, it was adjudged for the defendant.

CASE 13.

Dell against Babthorpe.

What shall extinguish a right of way.

1. Roll. Abr.

935.

5. Com. Dig.

518.

TRESPASS. Upon special verdict the case was, *J. S.* had a close, and a wood adjoining to it, and time out of mind a way had been used over the close to the wood to carry and re-carry. He granted the close to one, and the wood to another. The question was, If the grantee of the wood shall have the way?—And it was adjudged he should not; for the grantor by the grant of the close had excluded himself of the way, because it was not saved to him; and he himself could not use it, no more can his grantee. *Vide* 20. *Edw.* 3. "*Admeasurement*" 8.

CASE 14.

Clever against Gyles.

Trinity Term, 34. *Eliz.* Roll 865.

What shall be a sufficient deed to declare a use.

2. Co. 73. b.

Moor, 786.

2. Ro. Ab. 788.

4. Mod. 264. 267.

5. Co. Dig. 621.

Dougl. 45.

EJECTIONE FIRMÆ. It was found by special verdict, that *Knight* sold to *Onely* certain land by deed indented, upon condition of re-entry upon payment of twenty pounds, and that all assurances shall then be to him and his heirs; and covenants to make other assurances, and that they shall be to the uses in the indenture. Afterwards he makes a feoffment to the same bargainee, to the use of him and his heirs; and afterwards levies a fine to him, which was to the uses in the indenture. If by this absolute feoffment to the express use of the bargainee, his estate be conditional or not? was the question.—And adjudged, that notwithstanding the absolute feoffment, and to an express use; yet it being upon

no new agreement, this is guided by the covenant, and it shall rule it, as well as an exprels limitation of the use.

See 29. Car. 2. c. 3. and 4. & 5. Ann. c. 16.

CLEYER
against
GYLAS.

Porter *against* Gray.

CASE 15.

AVOWRY for an amercement in a leet, for not doing suit. *Qu.* If the defendant shall have costs on an avowry for an amercement? Ante. 245. Post. 329.

The plaintiff was non-suited, for which the defendant had a return, and he prayed his costs.—But the opinion of THE COURT was, he should not have costs; for it is not such a thing for which the statute (a) doth give costs, for it extends only to customs and services.

Moor, 839. Cro. Jac. 28. 520. Cro. Car. 534. Carth. 179. 1. Bac. Abr. 523. Dougl. 709.

2. Term Rep. 235.

(a) 7. Hen. 8. c. 4. 21. Hen. 8. c. 19. and vide 11. Geo. 2. c. 19. f. 22.

Bind *against* Plain.

CASE 16.

Vide Ante, Page 218. Case 5.

ERROR. Error assigned in the matter of law; and for that the plaintiff did aver, that between the 11th day of September and 14 days after Michaelmas no challenge or claim was made; and doth not answer to the residue of the 11th day of Sept. if claim was then made.

Certainty to a common intent is sufficient in a declaration. Ante, 218. Post. 358.

But POPHAM, C. J. and all THE COURT held it good. For it is good to a common intent, and we must not pinch so upon instances of time; and it shall not be presumed that challenge was made, if it were not specially alledged. The law presumeth all the day to be the day of the promise, and that no claim or challenge upon that day, if it be not shewn; and in any plea or declaration, it is sufficient to satisfy the common intendment. It hath been adjudged, that where an arbitrament was the 12th of April, and the arbitrator awarded that the party shall release all actions until the making of the award, in debt upon an obligation for non-performance of the award; he pleaded a release of all actions until the 12th of April; and it was adjudged a good plea; for the instant of time is not to be respected: wherefore the judgment was affirmed.

Dougl. 159.

Trinity

Trinity Term,

35. Eliz. In the Queen's Bench.

Sir John Popham, *Knt.* Chief Justice.

Sir Francis Gawdy, *Knt.*

John Clench, *Esq.*

Edward Fenner, *Esq.*

} Justices.

Sir Thomas Egerton, *Knt.* Attorney General.

Sir Edward Coke, *Knt.* Solicitor General.

CASE 1.

Hughes against Robotham, Executor of J. S.

A lessee for years may surrender to him who has the reversion for years, tho' the reversioner has a less term than the lessee.
Ante, 173.

ASSUMPSIT. That whereas the 14th April, &c. the plaintiff was possessed of a lease for years, and the testator was possessed of the reversion for years, the testator, in consideration the plaintiff would surrender to him all his estate, promised to give him thirty pounds; and alledges *in facto*, that 20th April, &c. he surrenders, &c. Upon *non assumpsit* it was found for the plaintiff.

1. Lev. 303. 323.
Pop. 31, 32.
Co. Lit. 192.
273. 337.
2. Roll. Ab. 494.
2. Vent. 327.
207.
Stein. 263.
Plowd. 541.
2. Bl. Com. 178.
Ld. Raym. 402.
3. Bac. Abr. 458.
Shep. Touch.
341.

FOSTER moved in arrest of judgment, FIRST, It was not alledged that he was possessed of the entire term at the time of the surrender; and it may be he had assigned part of it before to another.

SECONDLY, Both parties are termors; one in possession, and the other in reversion: and a termor cannot surrender to a termor, for one estate cannot drown in the other.

As to the first, all THE COURT held clearly that the declaration is good; for it shall not be otherwise intended, but that the estate did continue; and it being but an inducement, it need not be so precisely alledged.

To the second, POPHAM said, it is clear that he who hath an estate for ten years, may surrender to him that hath an estate for twelve years; and the estate is drowned, and the other shall come in possession; and there is no doubt but a surrender to him that hath a greater estate for years is good, as to him that hath an estate for life, which GAWDY did expressly affirm; and here it standeth indifferent, if the reversioner had a greater estate for years or not: but if one be lessee for twenty years, and he let the land for ten years, and he surrenders to him that hath the residue of the term, this is good to convey his interest, but not to drown the estate, but he shall have the twenty years as before: otherwise it is of a surrender to another man that hath the reversion for years.

And

And POPHAM conceived, that if the testator had the reversion for a less number of years, yet the surrender is good, and the estate shall drown in it. And if a man be lessee for twenty years, and the reversion is granted for one year to another, who grants it to the lessee for twenty years, this is a surrender of the first lease for twenty years, and is as if he had taken a new lease for a year of his lessor.

HUGHES
against
ROBOTNAM.

Quod FENNER, *Justice*, affirmed; and said the surrender was good, although the reversion was for a less term for years; for here are several terms out of the reversion, and one cannot stand with the other; but coming together, one shall drown the other: and the number of years is not material; for as he may surrender to him who hath the reversion in fee, so he may to him that hath the reversion for a lesser term: but when lessee for twenty years, maketh a lease for ten years, who surrenders; this cannot drown in the other, because it was not to commence until the term expired.—And it was adjudged accordingly for the plaintiff.

Ante, 173.
2 Bl. Com. 178.

V. Hill. 32. C. B. Placito 1.

Michaelmas Term,

35. & 36. Eliz. In the Queen's Bench
AT SAINT ALBAN'S.

Sir John Popham, *Knt. Chief Justice.*

Sir Francis Gawdy, *Knt.*

John Clench, *Esq.*

Edward Fenner, *Esq.*

} *Justices.*

Sir Thomas Egerton, *Knt. Attorney General.*

Sir Edward Coke, *Knt. Solicitor General.*

CASE 1. Balston and A. his Wife Executrix of M. S. against Baxter.

Part payment
and an agree-
ment to take
the residue at a
future day can-
not be pleaded
as satisfaction
in bar to debt
on bond.

Ante, 46.

Post. 306. 309.
727. b.

5. Co. 117. a.

6. Co. 44. a.

Plowd. 5.

Ld. Raym. 122.

2. Term Rep.
24.

DEBT upon an obligation made to the testator to pay 13l. 6s. 8d. dated 29. April, 23. Eliz. The condition was, to pay ten pounds at the feast of *St. Thomas* the apostle then next ensuing, at the church porch of *Newton*. The defendant pleaded, that before the said feast, viz. ult. Nov. 24. Eliz. the testator did agree with him, that if he would provide for him six pounds, and pay it at his house in *N.* the 15th day of *Decemb.* next, and would promise that he would pay the four pounds residue at the feast of *St. John Baptist* ensuing, that he would accept it in full satisfaction of the said sum of ten pounds; and alledgeth in *facto*, that he paid the said six pounds the said 15th day of *December*, and then promised that he would pay the residue at the said feast of *St. John the Baptist*; and the testator did then accept the said promise in full satisfaction of the said ten pounds. *Et hoc, &c.* Upon this it was demurr'd.—This term, upon the first motion, without any great delibera^{io} 1, THE COURT did adjudge for the plaintiff; for this is a concord pleaded, and is executory, and so can be no bar in debt upon a bond, no more than in a trespass; and this promise to pay the residue is a thing in action, and can be no bar of a debt which is certain: as in debt upon an obligation, it is no plea that he accepted another obligation in recompence of it. 11. *Hen. 4.*—But by *GAWDY*, If he had pleaded payment of a lesser sum before the day, and at another place, in satisfaction of a greater sum of money, and had relied upon it, this peradventure had been a good plea.—And they all resolved in the principal case, that it was no good plea to avoid a bond upon such naked matter.

CASE 2.

Nevill against Payne.

In quo warranto
it is a mis-trial if
the venire be of
"a vill" where
the prescription
is in right of "a
manor," and
the posses shall
not be certified.

QUO WARRANTO sued by *Nevill* in the name of the queen against the defendant, for claiming a leet within the manor of *Medburne*. The defendant pleaded, that he was seised in fee of the manor of *Medburne*, and claimed the leet there by prescription; and the *venire facias* (they being at issue upon the prescription) was awarded of the vill of *Medburne*, and tried against the queen: and it was upon motion adjudged a mis-trial; for the prescription being, that he had a leet within the manor of *M.* and issue joined upon

upon it, the *visne* was to be of the manor of *M.* and not of the village of *M.* for there was no mention of a village in the record, and the *venire facias* might well be of the manor.

NEVILL
against
PAYNE.

And then it was prayed, that the *poslea* might be certified; but because it was mis-tried, and so upon the matter no trial, and being against the queen, it was ordered the *poslea* should not be received; for if it should, the defendant might exemplify the verdict, as duly tried, and it would be an evidence against the queen, which shall not be suffered.

2. T. Rep. 484.

Doctor Caesar against Curseny.

CASE 3.

ACTION FOR WORDS. That whereas the plaintiff was Judge of the admiralty, and *J. S.* had a suit against the defendant, in which the plaintiff gave sentence against the defendant; the said defendant said, that the said sentence given by the plaintiff, *innuendo sententiam prædictæ*, &c. was corruptly given. The defendant pleaded not guilty, and found against him, and 200*l.* damages assessed. It was now moved in arrest of judgment, that an action did not lie for those words; for it is not alledged, that the sentence was corruptly given by the plaintiff; for it may be the defendant did intend it was corruptly given by reason of the false testimony of false witnesses, or corruption in them, and so touched not the plaintiff.—But THE COURT held, that the words can have no interpretation but in an ill sense, and to be intended of the Judge that gave the sentence; and so it is precisely alledged in the declaration.

Words action-
able.

10. Co. 104.

2. T. Rep. 199.

THEN it was moved, that a *tales* was awarded *de circumstantibus*, which was not to be awarded in this case, by the 35. Hen. 8. c. 6. for that is intended to be granted when the trial was all by *English*, and not when the trial is *per medietatem lingue*; for peradventure it shall be all of *English*, there being none there but such.—But all THE COURT held it within the intent of the statute, and within the letter of it; for it is, that in all actions, &c. *tales* shall be awarded as in the bench. But a question could not be, if it were in the bench; and where it was objected, peradventure there shall be no stranger there, the statute had regard to it, for then no *tales* can be served; for the statute is, *tales* shall be awarded *quales*, &c. and so shall be of such persons as were of the former return.

Justices of nisi
prius may give
a *tales de circum-*
stantibus on a
trial *de medietate*
lingue, for so
many aliens or
denizens as
shall be want-
ing.
Post. 818. 841.

10. Co. 105.

Cro. Jac. 316.

2. Hawk. 592.

THIRDLY, It was moved, that the *tales* was mis-awarded; for there are none returned but aliens, and not *de medietate*, &c.—And THE COURT conceived it to be good. For in this it is sufficient to return so many only, which with the other might make a full jury, but otherwise of *tales in banco*; wherefore here when aliens were only wanting, it was sufficient to return them. And it was adjudged for the plaintiff.

Rayne against Orton.

CASE 4.

Hilary Term, 34. Eliz. Roll 70.

ASSUMPSIT for 50*s.* upon an *indebitatus assumpsit*. The defendant pleaded, that after the *assumpsit* there was a concord between them, that he should give to the plaintiff fifteen shillings, parcel of it, and the thirty-five shillings residue the plaintiff should receive of him in hats; and alledgeth the payment of

A concord executory in part cannot be pleaded *sous pris*.
Plowd. 5. b.
Ld. Ray. 122.

T. Raym. 203. 450.
the

KATNE
against
ORTON.

Ante, 304.
2. T. Rep. 24.

the fifteen shillings, and that he was always ready to pay the residue in hats. And upon this it was demurred.—And without argument it was adjudged for the plaintiff; for it being a concord executory in part, can be no plea; for a concord is always to be intirely executed, and not to be executory in any part. And it was adjudged for the plaintiff. 6. Hen. 7. pl. 9.

CASE 5.

Sir Christopher Hilliard against Constable.

"He is a blood-
"sucker, and
"sucketh blood,"
are not action-
able, though
spoken of a jus-
tice of the peace.

ACTION for these words: "Sir Christopher Hilliard is a blood-sucker, and sucketh blood; but if any man will give him a bribe, as sheep, or a couple of capons, he will take them." Upon not guilty pleaded, it was found not guilty as to all the words except "he is a blood-sucker, and sucketh blood;" and for them he was found guilty.

3. Will. 184.
2. Bl. Rep.
751. 791.

The opinion of THE COURT was, upon motion in arrest of judgment, that the last words not being found, an action did not lie for the first: for though he alledged in his declaration, that he was a justice of peace, and one of the council in the north; yet the first words cannot be any slander, for it cannot be intended what blood he sucked. And by the advice of the greater part of all THE JUSTICES of England, it was adjudged for the defendant (a).

(a) This case was reconsidered, and judgment for the defendant affirmed. Post. 433.

CASE 6.

Burton and Estove against Gowell.

Trinity Term, 35. Eliz. Roll 92.

A will in writing may be revoked by a parol declaration importing a present intention.

Owen, 76.
Cro. Jac. 115.
3. Com. Dig. 10.
Powel on Dev.
534.
Gillb. on Wills,
419.
Dougl. 31. 40.
Cowp. 52. 87.

(a) Cro. Jac.
497.
1. Ro. Ab. 615.
Moor, 874.

TRESPASS. Upon special verdict the case was, *J. S.* was seised in fee of land, and by his will in writing made at *Pulham*, devised the land to the defendant; and after at *Sterston* lying sick *dixit & declaravit*, that his will made at *Pulham* shall not stand.

The question was, If this were a revocation, because it was by word only, and by words *in futuro*, and not *in presenti*?

To the first it was resolved, That a will may be revoked by parol only; and so is *Harrison's Case*, 14. Eliz. *Dyer*. 310. b.

To the second it was said, That *verba in futuro* shall be taken futurely when they refer to a future act, otherwise when they refer to a present resolution.—But by *POPHAM*, if he had said, "I will revoke my will made at *Pulham*," this is no present revocation, for it referred to a future act (a). But when he saith, "It shall not stand;" this takes effect presently: as if I say to another, "You shall have my land for ten years;" this is a present lease.—And it was adjudged a revocation (b).

(b) See 29. Car. 2. c. 3. which restrains parol revocations.

CASE 7.

Sherburne's Case.

In prohibition, if it appear that the right of tithes are in question, or that the prescription is not proved, a consultation shall not go. Ante, 71. 136. Post. 736. Moor, 907.

PROHIBITION against the parson of *Thachfly* for suing for tithes of wood of the park of *Thachfly*. And surmised, that he and all those, &c. time out of mind, &c. had used to pay to the vicar of *Thachfly* ten shillings yearly, for all tithes of wood grown: the prescription is not proved, a consultation shall not go. Ante, 71. 136. Post. 736. Moor, 907.

ing

ing in the said place. The proofs were, that he paid ten shillings for discharge of tithe-wood in the park, and two other places. SHAWNE'S CASE.

COKE, *Solicitor*, moved for a consultation.

First, Because he furnished he paid so much to the vicar in discharge of tithes; and by this the right of tithes, between the parson and vicar, is to come in question, which is merely triable in the court christian, as it hath been twice adjudged in this court, *Mich. 28. & 29. Eliz. inter Hunt & Bush*; and *Mich. 30. & 31. Eliz. the Lady Gresham's Case*.

Second cause. The proofs do not prove the prescription; for the prescription is to pay ten shillings for the tithes of the wood, &c. and the proofs are of that park, and two other places.—And of that opinion was THE COURT for both points. Cro Car. 576.

But it was adjourned, and no consultation awarded.

Crouch against Givers.

CASE 8.

ASSUMPSIT. For that the defendant, in consideration of a marriage, &c. assumed to give him *unum cubiculum*, *innuendo*, the furniture of a chamber; and for non-performance the action was brought; and upon *non assumpsit*, found for the plaintiff, and thirty-six pounds given in damages. An innuendo must have affinity to the matter precedent. 10. Co. 130. 1. Term Rep. 70.

COKE moved in arrest of judgment, that the breach is not well alledged, in not giving the furniture of a chamber, and the *innuendo* here can have no such intendment; and it is merely a collateral and void matter, as *innuendo* a horse; for the *innuendo* ought to have some affinity with the matter precedent.

GODFREY said the phrase of the country is so, to give a chamber upon the marriage; the meaning is, the furniture, &c.

But THE COURT *contra*. For *prima facie*, it is merely contrary, except it had been so averred in pleading. And it was adjudged for the defendant.

Gravener against Rake.

CASE 9.

Trinity Term, 33. Eliz. Roll 611.

THE question was, If an estate-tail might be of a copyhold?—

GAWDY and CLENCH. It cannot be by the statute; but may be by use and custom.—POPHAM and FENNER *contra*. That there may be an estate-tail by the statute of copyhold, by *equitatem rationis*, but it cannot be by custom. Whether a copyhold may be intailed by the statute *de donis* by custom only? Ante, 149. Post. 373. 717. Dig. 377.

907. *Gillb. Ten. 171. Co. Lit. 60. b. 4. Co. 23. See 1. Bac. Abr. 459. 1. Com. Dig. 377.*

Hall and Gaven and Others.

CASE 10.

INDICTMENT upon the 8. Hen. 6. c. 9. Exception was taken, because the statute was recited, *si aliquis expulsus sit et disseisitus*, whereas the statute is *vel disseisitus*. In an indictment, a mis-recital of the statute on which it is found is fatal. Ante, 186. 231. Post. 355. 393. 697.

But GAWDY and FENNER held it not much material; for although words are disjunctive, yet they are always expounded as copulative: for if he be not *expulsus et disseisitus*, action lieth not upon the statute. 1. Bull. 218. Cro. Jac. 498. Ter. Rep. 381.

Secondly, The statute was recited *vel aliquod feoffament aut discontinuationem*; whereas the statute is *post talem ingressum aliquod feoffament*. And for this mis-recital it was held insufficient.

2. Hale, 172. 2. Hawk. 353. 356. Dough. 94. Cowp. 474. 2. And

HALL and
GAVEN and
Others.

And it was moved, although the indictment was void for the entry with force; yet it being, that they with others *riotosè et routosè* entered, &c. it should be good for the riot.

CURIA *contra*: for the indictment beginning with the statute, and concluding *contra formam statuti*, this can have no relation to any offence, except upon this statute: and the indictment was awarded insufficient, and discharged.

CASE 11.

Ball against Roane.

Where slander refers to an event, that event must be averred to have happened.
Ante, 214.
Post, 342.

ACTION for these words: "There was never a robbery committed within forty miles of *Wellingborough*, but thou hadst thy part in it." After verdict it was moved in arrest of judgment, that the action did not lie, because it was not averred there was any robbery committed within forty miles, &c. for otherwise it is no slander.—*Et sic opinio CUR'*; and judgment for the defendant. *Mich. 36. & 37. Eliz. 6. R. Placito 11.*

CASE 12.

Preston against Pinder.

Words actionable.
Ante, 6.

ACTION for these words: "You have sought to murder me, and I can prove it."—Adjudged that it lay.

CASE 13.

Guerdon against Winterflud.

Words actionable.

ACTION for these words: "He is a suborner of perjury." After verdict, HARRIS, *serjeant*, moved, that the action did not lie; for it is not alledged, that he suborned any person to commit perjury; and the words of themselves have no sense, for one cannot suborn perjury.

CURIA *contra*: for he cannot be a suborner of perjury, but it must be necessarily intended he did suborn some person to commit perjury, and the words in themselves are very slanderous: wherefore it was adjudged for the plaintiff. And a hundred marks damages being given, THE COURT was moved to mitigate them; but they denied it.

CASE 14.

Pierepoint's Cafe.

Words not actionable.
Ante, 192.

ACTION for these words: "My master hath put me away, because I would not be a Papist; for he will keep no servants but Papists;" and alledged, that he was a justice of peace.—Upon demurrer, THE COURT held, that the action did not lie for those words (a).

(a) *Sed quare*; for by 1. Jac. 1. c. 4. s. 22. it is made high treason to convert others to popery. 1. Hawk. 67.

CASE 15.

Young against Watton.

Variance.
9. Term Rep.
233. 238.
5. Com. Dig. 25.

Easter Term, 35. Eliz. Roll 41.

DETINUE OF GOODS. The writ was *ad valentiam* twenty pounds: the declaration, *ad valentiam* forty pounds.—It was adjudged error, and the judgment reversed.

And in another writ of error between the same parties, *Pasch. 35. Eliz. Rot 42.*

First

FIRST ERROR assigned was, That there were not fifteen days between the *teste* and the return of the *venire facias*.—But it was held, that this was clearly helped by the statute of jeofails.

YOUNG
against
WATSON.

SECOND ERROR, That the *venire facias* had no return; for the statute did not help non-returns, but mis-returns.—And this was held error; for the jury appeared without warrant. And for this cause it was reversed. Error in *venire facias*. Post. 310.

Gore and Uxor against Perdue.

CASE 16.

Easter Term, 34. Eliz. Roll 234.

ERROR upon a judgment in dower, where the parties were at issue; and afterwards the defendants made default; whereupon a *petit cape* was awarded, and judgment given by default. Error assigned, that the tenant was within age at the time of the judgment.

In dower, the infancy of one defendant is no ground to reverse the judgment.

THE COURT held it no error, especially being after appearance, for he cannot save his default by non summons. *Vide* 7. Edw. 2. *3* 17. Edw. 2. "*Saver de Default*."

Post. 351. 557. 567. Cro. Jac. 111. 2. Cr. 465.

Moor, 465. 2. Brownl. 118. 2. Leon. 59. 3. Bac. Ab. 159. Post. 323. Ante, 51.

Tiblethorpe against Hunt.

CASE 17.

Hilary Term, 35. Eliz. Roll 557.

DEBT on a bond of 14l. for payment of 7l. The defendant pleaded payment at the day, and upon this they were at issue. The jury found payment of fifty shillings, parcel of it, and that the defendant then delivered to the plaintiff certain hats to the value of the residue, which he accepted.—And it was adjudged against the defendant; for this is no payment; but he might have pleaded this matter specially, and then the acceptance of the plaintiff had been a bar.

A payment in goods instead of money is no discharge of a bond, unless the obligee's acceptance is specially pleaded. Ante, 304.

The Queen against Ingerfall.

CASE 18.

ATTAINT. The case upon special verdict was, Brooks had sued an information for the queen and himself against the defendant, upon the statute, for buying of cattle out of fair or market, &c. and supposeth he bought the cattle of one *Pearepoint et aliis ignotis*. The defendant pleaded not guilty, and the jury find for the defendant.

A writ of attain lies by the queen alone on a verdict for the defendant in a *qui tam* information; but though the grand jury find that a false fact was given in evidence, yet the petty jury shall not be attainted, if such fact was not material to the point in issue. Ante, 140.

Upon this the queen alone, for she cannot join with the party, brought an attain; and the grand jury in the queen's bench, *Pasch.* 35. Eliz. find this special verdict, *scil.* "That it was given in evidence to the petit jury by one *Whitworth*, that the defendant out of fair and market did buy forty cattle, which were the cattle of *Pearepoint*; but they found, that in truth the cattle were bought of *Whitworth*, as the cattle of *Whitworth*; and that it was not given in evidence that they were bought of *Whitworth*, as the cattle of *Whitworth*: and if upon the whole matter, &c."

And it was argued by COKE and MANN for the queen, that upon this matter the jury is to be attainted: for here the point in issue is found, that they were bought out of fair or market; and it is not material if they were bought of him that is named in the information, or of others; and then the petit jury was to find him

1. Ro. Ab. 288. 4. Leon. 46. 2. Jones, 14. Co. Lit. 6. 5. Mod. 76. 113.

294. 355. Vaugh. 153. 11. Co. 6. 10. Co. 119. Carth. 362. Ld. Ray. 59. 470. Salk. 205. Skin. 595. 12. Mod. 85. 3. Inst. 164. 3. Bl. Com. 403, 404.

The QUEEN
against
INGERSALL,

guilty; and for that cited 38. Hen. 8. Bro. "*Issues*" 81. and a Case in the exchequer, 13. Eliz. in an information for buying of corn of J. S *contra formam statuti*; and the jury find it was bought of J. B. and adjudged against the defendant.—And so THE JUSTICES did agree here, that the buying of the cattle of any other person is sufficient to maintain the information. And although it be matter of law, yet the jury finding the contrary to it, an attaint lieth; as was *Pleadal's Case*, 10. Eliz. and 5. Eliz. *Dyer*, 219.

(a) Ld. Ray.
470.

It was here said by THE JUSTICES, that if the Judge delivers the law to the petit jury, and they find accordingly, although he mistakes the law, the jury shall not be attainedt (a).—And it was moved, if an attaint lieth where verdict passeth against the queen upon an information. And THE COURT held it did.

But in the principal case THE COURT held, that there was no sufficient matter to attaint the petit jury. For it appeareth, that the evidence given to them was false in part; and although the falsity was in a point not material, *scil.* that the cattle were the goods of *Pearepoint*, whereas they were the goods of *Whitworth*; yet by reason of this falsity, the jury need not give him credit in any other part; and so they had no cause to find their verdict upon this oath against the defendant. And here, though it was found he fold them *ut averia Whitworth*, yet this is an expresse averment, that they were the goods of *Whitworth*; as in pleading it is alledged, that land descend to one *ut filio et hæredi*.

CASE 19.

Hanger against Fry.

On a suggestion that a defendant has other lands in the same county, a second *elegit* may be awarded, on the return of the first *elegit*.
Ante, 160.

Moor, 341.
1. Roll. Abr.
304.
Gillb. Ex. 53.
1. Lut. 435.
Douglass, 231.

THE case upon special verdict was, That the plaintiff recovered in debt against *H. Fry*, and sued a writ of *elegit*; and the sheriff did deliver to him some lands of the said *H. Fry* in extent; *super quo* the plaintiff came in court, and surmisseth that the said *H. Fry* had other lands in the same county, and prayed another *elegit*, and had it; and by virtue of this second writ, the lands in question were delivered.

The question was, If this second extent was good? and if, not, whether it is void or voidable? 18. *Edw.* 2. "*Execution*," 140. 22. *Edw.* 3. pl. 14. 29. *Hen.* 8.

POPHAM, *Chief Justice*. If it doth appear that the plaintiff had taken the first land upon the delivery of the sheriff, and accepted it, then he cannot afterwards take a new extent; and if he doth, it is wholly void, and not merely voidable or erroneous; for then the record is ended, the attornies of both parties are out of court, and it is as a writ without original, which is wholly void. But here it is found, *super quo* he came and prayed a new extent; and this shall be intended the first day of the extent returned, and then it is reason that he may waive it, and pray a new extent; for he never accepted of the first; and so are the books, that if the demandant in dower accepted the land assigned by the sheriff, she cannot in another term pray a new execution.

FENNER and CLENCH were of the same opinion; and said, so is the course in the common pleas to grant a new *elegit*, if the party pray it upon such surmise.—And afterwards it was adjudged, that the new extent was good,

Staine;

Stainer *against* James.

CASE 20.

IT was moved in arrest of judgment, that the name of the sheriff was not to the *distringas*, nor to the *tales* awarded upon it; and it was tried by *nisi prius*. And it was said, that the name of the sheriff was not of necessity till the statute of *York*, nor was used or appointed; and by that statute, the sheriff is to forfeit a penalty, if he doth not return his name upon it; but this doth not make the return ill, and it is helped by the 32. *Hen.* 8. c. 30. which helps insufficient returns; and no writ returned.

If the sheriff's name be omitted in the process to the jurors, it is a cause to stay the judgment. Ante, 308. Post. 466. 509. 704.

CURIA *contra*: for of necessity the name of the sheriff is to be to the return, otherwise it appeareth not by what warrant it came in; and otherwise any man without the sheriff might return writs, which would be a great inconvenience: and the statute doth aid only insufficient returns, or when the writ cannot be found; so it may be intended it is embezzled. But here it appeareth, and that it was never returned; wherefore it cannot be good. And it was said, it was so ruled in the common pleas, 35. *Eliz.* *Walklie's Case*; and also in this court between *Mark and Lancaster*. And for this cause the judgment was stayed.

Moor, 65. 587. Cro. Jac. 188. Cro. Car. 189.

CASE 21.

Childe *against* Towers.

ASSUMPSIT in the county of *Warwick*, *Warwick* being in the margent. And declareth, That the defendant was possessed of a term for years at *Norton*, in the county of *Northampton*; et postea, *apud Stonely in com' prædict'* assumed, &c.

A relative shall be referred to its last antecedent. Ante, 101.

Upon non *assumpsit* the *venire facias* was awarded *de Stonely in com' War'*, and trial upon it.

Post. 324. 436.

And it was held a mis-trial by all THE COURT; for *apud Stonely in com. prædict'* shall be intended in *com. North.* which is last named, and not to *Warwick*, which is in the margent.

Hilary Term.

36. Eliz. In the Queen's Bench.

Sir John Popham, *Knt.* Chief Justice.Sir Francis Gawdy, *Knt.*John Clench, *Esq.*Edward Fenner, *Esq.*

} Justices.

Sir Thomas Egerton, *Knt.* Attorney General.Sir Edward Coke, *Knt.* Solicitor General.

CASE 1.

Thornaigh against Disney.

The addition of the plaintiff's name is not material in a declaration in debt on bond.

DEBT upon an obligation of four hundred pounds. The defendant demandeth judgment of the bill, for that the plaintiff in the obligation was named *J. Thornaigh, de Fenton in com' Nott. arm'*. and in the declaration he was named *Jo. Tho. arm'*; so "*de Fenton in com' Nott.*" were left out; and for this variance demands judgment.

Upon motion, without argument it was ruled, that the defendant should answer over; for this is no variance to abate the bill: when he is well named in his proper name and surname, the addition is not material; otherwise, if it were of the part of the defendant.

COKE, *Solicitor General*, who pleaded it, said, That he did it only to gain time, because it was a matter of great extremity. *Vide 3. Hen. 6. pl. 23. 5. Edw. 3. pl. 230.*

CASE 2.

Fortescue against Hext.

Hilary Term, 35. Eliz. Roll 35.

Words actionable.

ACTION for these words: Thou art a witch, an enchanter, a "necromancer, and a forcerer, and thereby wast the cause of "the death of my husband."—Upon demurrer, and reading the record, without any argument adjudged, that the action lay. For by POPHAM, there cannot be more heinous words, and by them the party was to suffer corporal punishment.

NOTA. The same Term and Roll, between the same parties, action for these words: "He is a witch, and bewitched my husband to death; FOR he made his picture in wax, and roasted it "every day by the fire, until he roasted my husband to death."

Upon demurrer, HARRIS, *serjeant*, moved, That these words will not maintain an action; for when she shewed the cause of the words, it appeareth to be a vain and fond conceit, and then no cause to call him a witch; as to say, "Thou art a thief, for thou "hast stolen my evidences."

But THE COURT held the words very heinous and actionable; and it was so adjudged.

See the statutes 1. Jac. 1. c. 12. and 9. Geo. 2. c. 5. 1. Hawk. P. C. 8.

Bleeverhassett

Bleverhassett *against* Baspoole.

CASE 3.

ACTION for words, for that the plaintiff was a justice of the peace, and the defendant was indicted of felony, and pleaded to it not guilty. The defendant said these words, "*Mr. Hassett did seek my life, and offered ten shillings to the under-sheriff to impanel a special jury that might find me guilty of the felony.*"—And it was adjudged that the words were very slanderous, being spoken of a justice of peace: and the plaintiff had judgment.

Words actionable.

Doctor Ford et Uxor *against* Hollingborough.

CASE 4.

Trinity Term, 35. Eliz. Roll 361.

DEBT upon an obligation brought by the plaintiff and his wife, executrix of *Dr. Drury*. The condition was, That whereas *Dr. Drury* had let land to the defendant for seventeen years; if the defendant or his executors do pay to *Dorothy Goldingham* ten pounds yearly, during the seventeen years, if he or his assigns, and all other persons that shall claim the said lands under him, shall or may so long occupy the same lands, &c. that then, &c. The defendant pleaded, that within five years, &c. he surrendered the said lands to *Dr. Drury*, and that all times before he paid the ten pounds: and upon this it was demurred in law.

A bond to pay an annuity to *A.* if he or his assigns shall or may occupy the lands let to him by *B.* is forfeited by non-payment to *A.* altho' the obligor has surrendered the lands to *B.*

COKE argued for the defendant, for that his estate was ended by the act and assent of the obligee himself, who was to take advantage of it, and therefore the action did not lie.—**TANFIELD** contra.

Hob. 103.
Hestl. 54.
Yelv. 23.
Poph. 39.
Owen, 104.
Moor, 597.
1. Wood's Cases 315.
Dougl. 384.
2. Term Rep. 366.

All **THE COURT** held that the action did lie; for the condition was collateral to pay money to a stranger, so long as he or his assignees might enjoy the land. Here, though he surrendered, yet to a stranger his estate is not determined, but is *in esse*: and this is an act to be done by him to a stranger, which the obligee shall not estop him to do; and the obligee who had the reversion, and who is in by the surrender, is as to a stranger in by him, and under his title, and occupied as his assignee. Also the words are, if he shall or may enjoy, &c. and here he might have enjoyed it; and therefore during the time he might have enjoyed it, he is to pay it.

But **POPHAM** said, if the condition had been, if he or his assignees, or those who should occupy the lands, should pay the money, and after he had surrendered to the obligee, and he did not pay it, the obligation had not been forfeited; for the obligee in that case was the party that was to pay it, and he should not take advantage of the non-payment, as 35. Hen. 6. "*Bar.*"—Wherefore it was adjudged for the plaintiff.

Clerk *against* Day.

CASE 5.

Hilary Term, 35. Eliz. Roll 467.

THE case upon special verdict was, *Joan Marsh* devised certain land to *Rose* her daughter for life; and, "if she marry after my death, and have heir of her body, then I will that the heir, have heir of her body, then the heir shall have the land after her death.—*Q^a*. If this passes an estate in tail, or for life? S. C. Owen, 148. Moor, 593. 1. Roll. 839. 2. Roll. 417. and see 1. Str. 15. L. Ray. 205. Fitzg. 24. 1. Burr. 42. 45. 3. Com. Dig. 26. Powel on Dev. 363. 2. Strange, 798. 804. "after

A devise to *A.* for life, and if she marry after my decease and

CLERK
against
DAY.

"after my daughter's death, shall have the land, and to the heirs of their body begotten; and if my daughter die without issue of her body begotten, then *Philip Taylor* shall have it to him and his heirs." *Joan Marsh* died. *Rose* married *Silly*, and had issue.

The question was, If *Rose* had an estate in tail, or for life only? First, It was agreed by all THE JUSTICES, that a devise to one and the heir of his body, is an estate tail, and shall go to all the heirs of her body; for "heir" is *nomen collectivum* (a), and one can have but one heir at one time, and this shall go from heir to heir.

(a) 2. Roll.

Abr. 253.

1. Roll. Ab.

332. K. pl. 1.

626. 2. Godb.

155. T. Jones, 111. Rob. Gavelk. 95, 96. Burr. 4. part v. pl. 38. Vin. Ab.

"Devise" U. a. pl. 13. and "Parols" H. See 1. Strange, 14.

But GAWDY and FENNER held, that *Rose* had but an estate for life; for so it is limited by express words, that she shall have for life; and then her heir shall take as a purchaser, and it shall not execute in *Rose* (b).

(b) Post. 316.

453. 1. Co. 66. Raym. 333. Keb. 18. 99. 176. Godb. 155. 2. Sid. 51. 2. Roll. Rep. 256. Plowd. 29. b. Palm. 404. Hetl. 76. Styles, 250. 1. Roll. 832. 2. Roll. 253. 417. 1. Bulst. 222. Moor, 533. Owen, 148. Co. Lit. 8. Cro. Jac. 145. Vide 1. Peere Will. 57, 58. 88. 2. Burr. 1110. 1. Salk. 242.

POPHAM, Chief Justice, contra. For the estate is limited to the ancestor, and after limited to the heir, and shall execute in the ancestor; especially the words being, "if she hath any heirs," and therefore intended that any heir shall have it. *Et adjournat* (c).

(c) No judg-

ment is entered on the roll, yet *Moor*, 593. says the opinion of the Court was given; and *Hale* cites it as such in the case of *The King v. Melleng*, 1. Ven. 214. 225.—See 2. Stra. 804. Fitzgibbon, 24.

In the case of *Shaw v. Weigh*, B. R. Mich. 9. Geo. 1. LORD RAYMOND inspected the roll of this case (the true name of which is *Cheat v. Day*. See 2. Stra. 804.) and that the devise was: "If she marry af-
"ter my death, and have ANY heir of her
"body then LAWFULLY BEGOTTEN, I
"will that THAT heir after my daughter's
"death shall have the land, &c. &c." L. C. B. PARKER'S MSS.

CASE 6.

Waring against Whale.

Easter Term, 34. Eliz. Roll 132.

If it does not appear by what authority a fine is levied, it is void.

ERROR to reverse a fine in *Shrewsbury*, levied before the bailiffs there.—First Error. It did not appear that they had any authority to take fines, and they cannot have it by prescription, or by general words in the king's grant.—Second, It is levied without any covenant.—Third, It is *de messuagio five tenemento*, which is in the disjunctive, and incertain (a).

(a) See the case of *Austin* and *Steen v. Courtney*, ante, 316, 317.

CURIA. This fine is void, for that it appeareth not by what authority the fine was levied; for it is in derogation of the crown, and profits of the crown, *pro licentiâ concordandâ*. And *Posth.* 36. Eliz. the fine was reversed.

CASE 7.

Ka. Geanes against Portman.

The consent of one joint-tenant that the other shall occupy and take the profits of the land to his own use, is a lease at will.

THE case upon special verdict was, *J. Geanes*, the husband of the plaintiff, and *T. G.* were joint-tenants for life, the reversion to *H. Portman*. *J. Geanes*, by the assent of *T. G.* occupied the land alone, and took the profits alone to his own use, and sowed the land to his own use, and made the plaintiff his executor, and died: and afterwards *T. G.* made his wife executrix, and died; she sold the corn to the defendant, who took it; and the plaintiff brought trespass.

Upon

Upon motion, all THE COURT agreed for the plaintiff; for by this assent, that J. G. alone should occupy the land, and take the profits to his own use, this doth amount to a lease at will, which one joint-tenant may make to the other; so the plaintiff hath good title: but if he had said to his companion, "I will not occupy it," this had not been material, for he doth not by this assent that his companion shall have all, nor gave anything by this to his companion.

GRANES
against
PORTMAN.

Co. Lit. 186. a.

Pratt against Stocke.

CASE 8.

ASSUMPSIT by an administrator. And counts of an administration granted to him by *Tho. Tayler*, bachelor of law, commissary to the bishop of London. The defendant pleads the 37. Hen. 8. c. 17. intending that none by that statute can be a commissary but a *doctor of law*. Also that since the last continuance (which was from *quindena Martini to die Lunæ post oct. Hillarii*) the bishop of London granted administration to him by his letters bearing date 27. January. Upon this it was demurred. Two points were moved.—First, If a bachelor of law may be a commissary since the 37. Hen. 8. c. 17.—Second, If administration be committed *pendente billâ*, if the will abateth?—But as to that, it was held clearly that the plea was mis-pleaded; for this is pleaded after the *darrein continuance*, where it appeareth to be after his plea pleaded. But THE COURT held for the plaintiff.

A person may be commissary to a bishop tho' he is not a doctor of laws.

Jones, 264.

Pop. 37.

Cro. Car. 258.

See 13. Car. 2. c. 2.

POPHAM, Justice, said, that administration and probate of wills was by the common law, which any might do; and the 37. Hen. 8. c. 17. is in the affirmative, that doctors of the civil law may be commissaries though they are married; but it is not restrictive that no other may be commissaries, and therefore taketh not away the liberty at common law. And if a bachelor at law cannot be a commissary, yet acts done by him are not void till they be avoided by sentence; as if a layman be presented, instituted, and inducted, this is not void.—And to the second, they hold that if letters of administration be granted to one, and after are granted to another, by this the first are not avoided, except by judicial sentence; but by the mis-pleading this cometh not in question.—And the plaintiff had judgment.

If administration be granted to one and after to another, the first is not void, but voidable only.

Post. 457.

Peer. Will. 43.

767.

Cowp. 140.

Cro. Jac. 258.

259.

Ante, 283.

Buckland against Brook.

CASE 9.

Hilary Term, 35. Eliz. Roll 360.

ASSUMPSIT against the defendant, as administrator, *W. Brooke* upon an *indebitatus assumpsit*. The action was brought Hill. 35. The defendant pleads, that the intestate such a day made an obligation to J. S. of forty pounds for payment of twenty pounds at Michaelmas, which should be *Ann. Dom. 1593*; and that he hath fully administered all the goods of the intestate which were the intestate's at the time of his death, except to satisfy the said twenty pounds: *et sic nihil habet nec tempore exhibitionis billæ prædictæ habuit*, &c. and upon this it was demurred.

An administrator shall not be obliged to pay simple contract debts while bond debts remain unsatisfied, although the bonds are not due; and *plene adm.*

FOSTER, for the plaintiff. That this debt upon contract is to be satisfied before the debt upon the obligation, which is not yet

of the goods which were the intestate's at the time of his death, is good. B. R. H. 228.

Post. 575, 822. Went. 141. 3. Lev. 57. Cro. Car. 363. 1. Salk. 1. 296. 1. Term Rep. 690.

due;

BUCKLAND
against
BROOK.

due; for by this means he may defeat all contracts by a debt upon bond which shall be due one hundred years after. Also the plea is not good, for that he saith that he hath no goods which were the intestate's at the time of his death; for he may have goods that were not the intestate's at the time of his death; and so is 7. Hen. 4. pl. 39. Also he ought to answer to the time since the bill exhibited; for he ought to say, he had not at the time of the bill exhibited, or at any time *postea*; and *non habet*, &c. without answering to the mean time is not good.

CURIA contra. The matter of the plea is good, for debts upon bond are to be paid before debts by contract; and this proved by the declaration in these actions, that he hath sufficient to satisfy all other debts. And to the first exception, the plea is good to a common intent; and if the truth be as the plaintiff suppoeth, he is to shew it; and the YEAR BOOK of 7. Hen. 4. is not law in that point.

THE COURT doubted as to the last exception; but DANIEL said it was but of form, and it was not shewed for cause of demurrer. *Et adjournatur*.

CASE 30.

Cordal's Case.

A devise of lands to executors for the payment of debts; and when they are paid *A.* for life, remainder in tail; the executors have but a chattel and no freehold; and the estate tail remains unexecuted and disjoined during the life of *A.* S. C. S. Co. 96.

NOTA. COKE, *Attorney General*, shewed to me a resolution of GAWDY and ANDERSON in a case referred to them by the queen's commandment, in which two points were resolved; where a devise was to two persons of lands to hold for payment of the legacies in a will, and the debts of the testator; and afterwards to *Ed. Cordal* his brother for life; remainder to his first son in tail, and so to the second; the remainder to the heirs of the body of *Ed. Cordal*.

First, It was resolved, that this is no freehold in the two persons,

but only a term for years, although it cannot be said for any certain number of years; for the profits are not certain, nor the debts; yet it is a chattel, and *quasi* a term, as a devise during the minority of *J. S.* or land extended for debt; and this is in favour of wills: but otherwise it is of such a limitation in a deed, for there it is a freehold conditional (*a*).

(a) Co. Lit. 42. a.

3. Lev. 314. 347. 1. Jones, 25. Ray 136. 1. Sid. 224. 2. Bulst. 273. Allen, 47. 1. Lev. 100. 1. Roll. Abr. 829. Fearne, 271. 1. Stra. 16. Swinb. 37.

Second, It was resolved, that the estate tail was not executed for the possibility of the mean estate that might interpose, and therefore it was always disjoined during the life of *Ed. Cordal*; so that of that estate his wife could not be endowed. And this was resolved upon conference (*b*).

(b) Ante, 314.

Co. Lit. 28. a. 2. Saund. 383. 386. B. R. H. 13. 3. Lev. 447.—See also Cas. tem. Hard. 17. where Lord Hardwick says, that in 2. Saund. 336. Cordal's case is denied to be law.—See vide Mr. Hargrave's note [3] Co. Lit. 239. b. 3. Coun. Dig. 230. Fearne's Cont. Rem. 271. Gilbert's Law of Devise, 71. 3. Atk. 246.

Easter

Easter Term,

317

36. Eliz. In the Queen's Bench.

Sir John Popham, *Knt.* Chief Justice.

Sir Francis Gawdy, *Knt.*

John Clench, *Esq.*

Edward Fenner, *Esq.*

} Justices.

Sir Edward Coke (a), *Knt.* Attorney General.

Solicitor General.

(a) Appointed
10. April, 1593.

NOTA. In this Term there were ten Serjeants made, who appeared in chancery *tres septim. Pasch.* viz. John Heal, of the INNER TEMPLE; of GRAY'S-INN, William Daniel and John Spurling; of LINCOLN'S-INN, George Kingsmill, Peter Warberton, Richard Braithwaite, and Thomas Fleming; of the MIDDLE-TEMPLE, Richard Lewker, John Savill, and David Williams. All of them except Daniel and Kingsmill had their writs in Michaelmas Term, returnable in Easter Term, as the Justices said the order was to have one Term between the writ and the return; but Daniel and Kingsmill had their writs in the vacation between Hilary and Easter Term; yet they all appeared together, and had their antiquities as they were.

A Call of Serjeants.

Godfry against More.

CASE 1.

ACTION for these words: "Thou hast killed a man at *Mal-den* in *Essex*." Upon not guilty, it was found for the plaintiff; and moved in arrest of judgment, that the words were not actionable, for they were too general; for it may be he killed one in his defence, or he killed a thief that assaulted him in the high-way, or was an officer, and in arresting killed him, &c.—And of this opinion at the first was GAWDY.—But it being moved again, all THE COURT held, that the words being alledged to be spoken maliciously, shall be taken most strongly against him that spoke them: and it was adjudged for the plaintiff.

Words spoken maliciously shall be taken strongly against the speaker of them.

1. Bl. Rep. 960.

Tryor against Bestney Betts.

CASE 2.

PROHIBITION for suing for tithe-hay in *Chartres*. And furnished, that the defendant is parson *imparsonée* of the parsonage of *Chartres*; and that there was a vicar of *Chartres*, of which the defendant was patron, &c. and that time out of mind, &c. he had used to pay to the said vicar, in full satisfaction of the tithes of hay of the place, where, &c. six shillings and eightpence *per annum*, and the pasturing of a horse in the same place.—GODFREY moved that it was no good surmise, for by it the right of tithes came in question, to whom they were to be paid, to the parson or vicar? as 31. *Hen. 6.* and 6. *Edw. 4.* are, and *Bushe's Case* in this court.—GAWDY and POPHAM. Where the right of tithes is to come in question, this shall be tried in the court christian; and it is no plea he hath used to pay the tithes to the vicar, for then he confesseth he ought to pay tithes; but the question was, Who should have them? And this shall be tried in the court christian; and that was the reason in *Bushe's Case*; for there he pretended he was to pay tithes in *specie*, but here it is only a *modus decimandi*;

To pay the vicar 6s. 8d. a year, and to pasture a horse, is a good *modus* for tithe-hay; and the parson shall be prohibited from suing for the tithes in *specie*. Ante, 71.

Dougl. 204.

which

TRYON
against
BESTNEY
BETTS.

which though he pleads it to be to the vicar in discharge of tithes, yet it is good; for otherwise there will be a great mischief; for the spiritual court will not allow a plea of *modus decimandi*, but only of payment of tithes in kind; and they will not allow him to plead the interest of the vicar, nor payment to him for discharge, but he ought to come in *pro interesse*: and if he will not come, but collude with the parson, to charge the parishioners to pay tithes in *specie*, he shall be charged to pay other tithes than he hath used; and therefore the common law shall aid him, and especially as this case is, as it was moved by TANFIELD, that the defendant is patron of the vicarage, and the vicar in consideration of these tithes dischargeth him of all spiritual care and charge.—FENNER and CLENCH inclined to this opinion. *Et adjournatur*.

CASE 4.

Grills against Ridgeway.

In what cases a
repleader may be
awarded.

Ante, 62.

Post. 439. 883.

1. Saund, 128.

Ray. 458.

Cro. Jac. 678.

1. Salk. 173.

2. Salk. 579.

Dougl. 396. 747.

THE case 3. Co. 52. b.—GAWDY said, it is without question that a repleader may well be after a demurrer; but that is when the pleading is insufficient of both parties.—POPHAM. If it be insufficient in matter, so that by it the action is confessed, and the plaintiff reply, and a demurrer upon it, yet judgment shall be given against the defendant; but where the bar is insufficient not in matter, but in form (as for want of a traverse), and a replication is to it, which is ill, and a demurrer upon it, there shall be repleader.—Afterwards THE JUSTICES moved the parties to discontinue the action, and to commence again; and so they did.

The case referred to in *Lord Coke's Reports* was an action of debt against the sheriff of Devon for an escape. The declaration stated, that the sheriff had taken the prisoner in execution at *Stoke-Cannon* in the said county, and had afterwards suffered him to escape in the *Ward of Cheap, London*. The defendant pleaded, and confessed that the prisoner was taken at *Stoke-Cannon*; and escaped; upon which he (*the sheriff*) made fresh suit at *Stoke-Cannon* aforesaid, and by virtue of the said execution, and before action brought, retook the prisoner. The plaintiff replies by way of protestation, that the defendant did not

make fresh suit; that after the prisoner's escape, and before he was retaken, he was one whole day and night at the *Ward of Cheap, in London*, out of the sight of the defendant. To this replication the defendant demurred. And it was agreed, that the bar was insufficient in justifying the re-taking at *Stoke-Cannon*, without answering the escape at *London*; and that if the plaintiff had demurred, he should have had judgment; but that as he had chosen to rely upon the protestation that the prisoner was *out of sight*, and had not denied the *fresh suit*, there did not appear upon the record any cause of action.

CASE 5.

Rowland Hargthorpe against Margery Milforth and Anth. Milforth.

An executor
shall only be
charged to the
amount of the
assets which
come to his
hands, and not
for the wrong or
devastavit of his
companion.
Ante, 216.

Dyer, 210.

Godol. 134.

Went. 100.

Salk. 318.

DEBT against the defendants as executors. They pleaded *fully administered*, and so nothing in their hands. Upon issue the jury found, that they two, and one *Agnes Milforth* their mother, were made executors; and that *Agnes* had administered, and wasted goods to the value of six hundred pounds, and that the defendants had not of the goods of the testator but to the value of sixteen pounds; and that *Agnes* was dead: and, If they should be charged by this *devastavit* of their co-executor, or only charged for the sixteen pounds? was the question.—THE COURT held clearly, that one executor shall not be charged by the *devastavit* made by his companion; for the act of one executor shall charge the other no further than the goods of the testator in his hands amount unto,

1. Ch. Ca. 57. Cowp. 289. 2. Brown's Cas. Ch. 114.

but

but not to charge him of his own goods; for it was the folly of the testator, to put such trust in one that would do such acts to his disadvantage; but the acts of one shall not hurt the other, for their own goods: as if one executor will confess an action, this shall bind the other: so if he will release an action, or give away all the goods of the testator, this shall bind his companion. *Vide 3. & 4. El. Dyer, 210. 21. Hen. 6. pl. 46.* Where they shall be charged of the goods of the testator, the non-suit, release, or other act of one shall bind the other; but not if they shall be charged of their own goods. *11. Hen. 4. 69.* Where both do waste the goods, execution shall be against both of their proper goods.

HARGTHORPE
against
MILFORTH.

It was then moved, if judgment shall be against them of the whole debt, or of so much as is found in their hands?—And THE COURT held clearly, that judgment shall be of the whole debt, but that execution shall be only for the sixteen pounds which is found to be in their hands; for otherwise the plaintiff shall be barred of the residue, which is inconvenient. *Vide 46. Edw. 3. pl. 9. 7. Edw. 4. pl. 9. 33. Hen. 6. pl. 24. 34. Hen. 6. pl. 24.*

On assets found judgment shall be for the whole debt: but the execution shall be only for the assets found. *Post. 592.*

And afterwards, at the end of the Term, all the prothonotaries of the common pleas certified that their course was not to enter judgment of the whole debt, but only that he shall recover so much as was found in their hands; and thereupon THE JUSTICES would advise of their judgment in that point: but for the first point they were all resolved *ut supra*.

Cro. Car. 167. 373. 1. Roll. Ab 929. 8. Co. 134. Moor, 246.

Fulshaw against Ascue.

CASE 5.

ERROR to reverse a judgment in the common pleas. For that Ascue brought an *audita querela* to avoid a statute acknowledged before the mayor of Lincoln, because it was sealed with a seal of one piece, where the *13. Eliz. c. 1. de mercatoribus (a)* doth appoint it to be sealed with a seal of two pieces; whereof the mayor shall keep one, and the clerk appointed for this purpose the other. The defendant pleaded it was sealed with a seal of two pieces, according to the statute; and thereupon at the *nisi prius* at the city of Lincoln, it was found for the plaintiff in the *audita querela*: and thereupon, in the common pleas, it was adjudged, that *statutum prædictum in formâ prædictæ. recognitum penitus vacuum foret, et pro nullo habeatur*. Upon this error was brought.—First, For that the trial in this case was not good; for the issue was not to be tried *per pais*, but by the certificate of the mayor; and all the other matters were alledged as before in the common pleas.—Second, That this judgment *quod penitus evacuetur* is erroneous, for though it be void as a statute, yet it is good as an obligation.—But the judgment was affirmed: for as to the trial, it was a matter in fact, triable by the county; and if it be not a statute, it is no obligation: but being discharged as a statute, it hath lost its force in all respects; and that the sole means to avoid it is by an *audita querela*; for error lieth where the statute is good, but the execution is erroneously sued upon it, as *17. Aff. (b)*. And the judgment was affirmed. *Vide the judgment in C. B. Pasch. 33. Placito 4. page 233.*

Whether a statute merchant legally sealed shall be tried upon *audita querela per pais*; and if bad as a statute, it is void as an obligation.

Ante, 233. Post. 355. 810.

(a) Owen, 242. Dyer, 35. 1. Leon. 233. 4. Co. 30.

Carth. 281.

4. Mod. 314. Salk. 262.

(b) See 2. Bac. Abr. 333. and 3. Cés. 1. c. 25.

CASE 7.

Codwell against Parker.

Michaelmas Term, 33. & 34. Eliz. Roll 419.

It is a mis-trial if a juror be returned by one christian name and sworn by another.

The cause of awarding a *venire facias de novo* need not be specially entered on the record. Ante, 57.

APPEAL DE MAIHEM. The parties were at issue, and one juror was returned by the name of *Palus Cheale*; but in the *distringas*, and panel annexed, he was named *Paulus Cheale*, and by that name sworn. This matter was alledged in arrest of judgment; and it was held no trial, for it was only by eleven.

FOR that cause a *venire facias de novo* was awarded. Vide 5. Co. 42. b. and the issue was tried. It was moved in arrest of judgment, for that the record was entered, that in the first *venire facias* one *Palus Cheale* was returned, and in the *distringas* awarded upon it, *Palus Cheale* was left out, and *Paulus Cheale* put in, *super quo consideratum est per Cur.* that a *venire facias de novo* shall be awarded; but it is not mentioned that *Paulus Cheale* was sworn, and trial had; wherefore no cause here appeareth to award a *venire facias de novo*; and so this is mis-awarded.—But THE COURT held, although this be the cause set down in the record, yet it shall be intended that there is a good cause apparent upon the whole record together to award a *venire facias de novo*; and the Court seeing it, did award the second *venire facias*; and it shall not be intended to be an error, when there is any cause to justify it: and the cause mentioned in the record is not so material to bind them; for the office of the Court is to see all the causes, and to give judgment upon any matter which may appear to them; and it shall be intended they did so, as 22. Edw. 4. 45. b. upon a judgment in a writ of dower.

Want of manucaptors on the *distringas* may be amended.

ANOTHER EXCEPTION was taken, Because no manucaptors are returned upon the *distringas*.—THE COURT held it shall be amended by the sheriff, and it is not material if no manucaptors be returned when the jury appeareth full, and the verdict given upon it is good, 3. Hen. 7. pl. 8. And judgment was given for the plaintiff.

CASE 8.

Walsh against Collinger.

Michaelmas Term, 32. & 33. Eliz. Roll 460.

If a plaintiff be made the judge of the court, he must be excepted to at the time.

Moor, 365. Cro. Car. 184. 1. Strange, 640.

On a prescription to hold a court before two aldermen, it may be assigned for error that one was not alderman at the time alledged.

ERROR to reverse a judgment in the court of N. I.—**ERROR,** That the judgment is entered to be before the mayor and *J. S. et J. D. aldermannis*, &c. and at the same time the plaintiff was made mayor, pending the suit.—*Sed non allocatur*; unless the party had excepted to it in the court, and it was disallowed there, then it had been error; but if he admits him to be his own judge, it is not error, 2. Hen. 4. pl. 4.

2. Term Rep. 87. Cases in Crown Law, 105.

SECOND ERROR. The prescription is to hold courts before the mayor and two aldermen; and it is alledged that at such a court held before the mayor and *J. S. and J. D. aldermen*, &c. and alledged in *facto*, that *J. S.* was not then alderman. The defendant pleaded *in nullo est erratum*.—**GODFREY** moved that this is no error, no more than in error to avoid a fine, that one of the Judges before whom the fine is supposed to be levied, was not a Judge. 1. Ed. 5. pl. 3. b.—But THE COURT (*absente* POPHAM) held it to be a manifest error; for the court cannot be held except before aldermen, so there must be two at least; and if *J. S.*

WAS

was not alderman, there were not two aldermen; and it is not like the case of a fine, for that is before such Justices, *et aliis fidelibus*; and if there be no such Judge as one of them which is named, yet the fine being levied before other Justices is good. And for this cause the judgment was reversed.—It was here held by THE JUSTICES, that a discontinuance after verdict is not helped by any statute.

WALSH
against
COLLINGER.

Jeoffail.

Griffin against Spencer.

CASE 3.

ERROR of a judgment in the common pleas. Error assigned was, That *Spencer* brought debt upon an obligation against *Griffin*. The condition was, that if *Griffin* pay to *Spencer* a hundred pounds within one month after notice of his return from *Constantinople in Istria into England*, that then, &c. The defendant pleads, that there was no notice given to him of the return, &c. Upon this the issue is taken, and found for the plaintiff; and judgment given for him.—Error was assigned, Because it was not averred, that the money was not paid; and then no cause of action. As in debt for non-performance of an arbitrament the defendant pleads no arbitrament; the plaintiff shall not only say that they made an arbitrament, but also that the defendant had not performed it, in such a part, to inform the Court that there is good cause of action; so here.—But THE COURT held clearly that it was no error; for when the defendant saith he had no notice, this is a confession *per nient dedire* that he had not paid it. And issue being taken upon a collateral matter, and found for the plaintiff, judgment shall be given for him. Wherefore the judgment was affirmed.

Debt on bond for non-payment after notice of a certain event. Plea no notice, and issue thereon, the plaintiff need not reply that the money was not paid.
Post, 899.
Yelv. 25. 78.
1. Sid. 340.
1. Saun. 102. 317.
3. Lev. 24.
Lut. 528.
1. Vent. 114. 126.
Show. 148.
1. Lev. 55.
Hard. 377.
1. Salk. 138.
3. Bac. Abr. 716.
Doug. 732.

Read and Morpeth against Erington.

Trinity Term, 33. Eliz. Roll 611.

CASE 9.

EJECTIONE FIRMÆ. And declares of a lease made by *Anthony Mitford*, 20th January, 11. Eliz. of 200 acres of land, 100 acres of meadow, and 150 acres *de pasture* in *Pont-Island*, *habendum* from the feast of *St. Michael* last past for twenty years.

If a man seised in fee make a feoffment to the use of *A.* in tail or for life, remainder to the use of his own right heirs; the land, upon the death of *A.* without issue, returns to the feoffor as his ancient reversion, and does not vest in his right heir as a remainder by purchase.
Post. 334.

Upon not guilty pleaded, the jury find a special verdict, which was thus in substance: "That *Anthony Mitford* was seised in fee of the manor of *Pont-Island*, in the county of *Northumberland*, of which the tenements in which, &c. were parcel, and of other lands called *Crawleys*, in *Pont-Island*, parcel also, tenement in quibus, &c. and of another parcel of land called *Island-Green*, in *Pont-Island*, parcel of the tenements in which, &c.: and being so seised, 8. Eliz. conveyeth the manor of *Pont-Island* to the use of himself for life, remainder to *Jasper* his eldest son, and the heirs males of his body, remainder to the right heirs of *Anthony*: and the lands called *Crawleys* to the use of the said *Jasper*, and *Margaret* his wife, and of the heirs males of the body of *Jasper*: and afterwards to the use of the right heirs of *Anthony*: and the lands called *Island-Green* to the use of the said *Anthony* and *Julian* his wife for their lives, remainder *ut supra*." And they further find, "that *Jasper* had issue *Mary* his daughter, married to the defendant, and afterwards died without issue male; and that *Jasper* was the eldest son, and heir of *Anthony*."

Moor, 284. 744.
Dyer, 133.
1. Leon. 182.
Co. Lit. 22.
2. Co. 91.
1. Med. 237.
Doug. 774.

Pop. 3. 2. Ro. Ab. 418. 1. Co. 130.

ERO. ELIZ. PART I.

Y

And

READ
and
MORFETH
against
BRINGTON.

And they further find, "that *Anthony*, 11. *Eliz.* makes the lease in the declaration *prout*, &c. and that afterwards the lessees, 24th *March*, 11. *Eliz.* made a deed of feoffment of these lands to *Alexander Heron* and others in fee, with a letter of attorney to enter into them or any part thereof; and to make livery according to the deed; and that the attorney made livery in a stable of a house, parcel of the manor of *Pont-Island*, *Anthony Mitford* the lessor being then and there present; and that at the time of the livery the lands called *Crawleys* were in the possession of *Anthony*, as tenant at sufferance to the said *Margaret* the wife of *Jasper*; and that the lands called *Island-Green* were in the hands of divers farmers and lessees, by virtue of several leases to them made before the lease made 11. *Eliz.*; and that *Anthony* and *Julian* were dead; and that the said *Alexander Heron*, and the other feoffees, enter and grant all their term, estate, and interest to the lessees of the plaintiff. *Et si super totam materiam*," &c.

NOTA. The jury found that *Crawleys* contained sixty acres, and *Island-Green* one hundred and twenty.

Upon this special verdict these matters were moved.—FIRST, If the remainder limited to the right heirs of *Anthony Mitford* for *Crawleys*, in which he had no particular estate, be in him as his ancient reversion, or vesteth in his right heir as a remainder by purchase; for if it were a purchase in the heir, it was not chargeable with the lease of *Anthony Mitford*.—And all THE COURT resolved clearly, that the use limited to the right heirs of *Anthony* is the ancient use in him, and was never out of him, and is in him as a reversion to grant or charge; and from him shall descend to his heir, and is as if it had not been mentioned; and the limitation to his right heirs is a void limitation, and is no more than the law vests in him.

A lessee for years may make a feoffment, notwithstanding the presence of the lessor; for the lessee has the possession, and may dispose of it; but it is an extinguishment of the lease, and the lessor may enter for the forfeiture.

Jones, 315.
Co. Lit. 48. 84.
and see the latter part of Mr. Butler's note (1), page 330. in page 337. b.
2. Co. 22. 31.
2. Roll. Abr. 3.
13. Vinet, 179.
1. Wood. Con. 503.
Dyer, 362. b. in natu. 3. Atk. 339.

SECOND QUESTION. If this feoffment by the lessee for years, the lessor being upon the land, was a good feoffment? For the lessor (as it was said) cannot be disseised, he being upon the land; and no freehold can be divested out of him: but he being in possession guards the land, that no feoffment can be made.—CURIA contra. That it is a good feoffment, and shall enure by way of feoffment; for the lessor and lessee being upon the land, the law shall judge him in possession that hath the right of it; and the lessee hath the sole right to the possession; and livery ought always to be given of the possession; and therefore he that hath the possession shall make the livery: and therefore if the lessor makes livery, the lessee being upon the land and contradicting it, this is void; for it cannot enure upon the possession, nor give it, when the lessee is there and keeps it; and the law shall adjudge it only in him: and when he cannot give or meddle with the possession, he cannot make livery. And *converso*, when the lessee hath possession he may make livery; and the presence of the lessor, which hath nothing to do there, cannot disturb it: but immediately by his being there, this is an entry by him, and a revesting of the freehold in him: so *Perkins*, f. and *Dy.* 360.—And *POPHAM* said, that if it cannot enure as a feoffment, and though it cannot divest the freehold, nor be a disseisin to the lessor, yet clearly it is a forfeiture; because the lessee had taken upon him to make a feoffment, and give a fee simple;

1. Term Rep. 733.

and

and so it is an extinguishment of his term: as if the lessee of the queen makes a feoffment, no freehold passed; for he cannot divest the freehold out of the queen; yet it is a forfeiture.—And for these causes the Court did clearly resolve for that part for the defendant: but for *Crawleys*, because it was found to be in the hands of *Anthony Mitford* as lessee to *Margaret*, it was held that nothing passed: and so for *Island-Green*, as that was found to be in the hands of several farmers, nothing passed, nor was it any forfeiture.

READ
and
MORFETH
against
ERINGTON.
1. Co. 76. a.

THIRDLY, COKE Attorney General moved, that the plaintiff had declared of a lease made 10. Jan. 11. Eliz. *habendum* from *Michaelmas* before: and it appears by the special verdict it did not commence from *Michaelmas* before; for it was the jointure of *Margaret*, who was tenant for life, and died afterwards; so for that it was a lease only from the time of her death; and so the plaintiff had failed in his declaration.—But THE COURT resolved, that the declaration was good as to that point; for it being by indenture (as it was found), it is good between the parties: and *Margaret* being dead, it shall be said to begin according to the time limited in the indenture; and he cannot declare in any other manner: but if it had been without deed, peradventure it should be otherwise.

In ejectment, a lease commencing in fact subsequent to the time to which the *habendum* relates, is good.

FOURTHLY, It was moved, that for *Island-Green* the verdict is for the defendant; for it is found it was in the hands of farmers and lessees, (a) by virtue of leases made before this lease: and it was not found that their leases are ended; and then it shall be intended that they yet continue; and then the defendant cannot be guilty of the ejectment of the plaintiff.—But THE COURT conceived this not to be material; it being not found that the defendant claimed under the lessees; and the plaintiff having entered, and the defendant entering upon him, this is an ejectment of the plaintiff, for which the plaintiff shall punish him.—And it was resolved, that for the manor of *Pont-Island*, judgment shall be for the defendant; and for *Crawleys* and *Island-Green*, judgment shall be entered for the plaintiff.

A special verdict in ejectment need not find that the leases of the tenants were expired, if the plaintiff does not claim under them.

(a) See 11. Geo. 2. c. 19.

Downs against Hopkins.

CASE 10.

IT was found, by special verdict, that the land was ancient copyhold land demisable for one or two lives; and that this land was granted by copy to *J. Downs*, the husband of the plaintiff, *habendum* to him for life, and to the plaintiff *durante viduitate sua*. The question was, If this were warranted by the custom, for the wife's estate? for it is no absolute, but a limited estate.—But all THE JUSTICES did hold, without any argument, that it was good: for when the custom warranted the greater estate for life to be made, it doth warrant the lesser estate; specially here, because this is also an estate for life, but limited, and as it were conditional.—Then it was moved, that the wife was named only in the *habendum*. And it was held good; for it is common in copies. And so adjudged, 4 Co. 23.

A custom to grant lands to a man for life, and to his wife, during her widowhood, is good. Ante, 115. Post. 373.

1. Ro. Ab. 511.
Pop. 35.
4 Co. 30.
1. Saund. 151.
1. Salk. 188.
2. Vern. 264.
1. T. Rep. 466.

Hopton and his Wife against Johns.

CASE 11.

ERROR to reverse a common recovery had against the wife and her former husband, in which they were tenants, and vouched the common vouchee. The error assigned was, That the *feme* was an infant, and appeared in person, and not by guardian, and lost; person, and not by guardian.—10. Co. 49. Cruise on Recov. 124. Ante, 309.

A common recovery reversed, notwithstanding the *feme* was an infant, and appeared in

HORTON
against
JOHNS.

and so is as a recovery by default; although they appeared and pleaded, for that judgment was given upon default; and common recovery is but a common assurance, and not a recovery by title, which peradventure should be good; and an infant cannot make an assurance: and therefore it was erroneous.—And for this cause the judgment was reversed.

CASE 12.

Charter against Freind.

Hilary Term, 35. Eliz. Roll 502.

An audita querela must be brought to vacate a judgment in redisseisin.

ERROR upon a judgment in *redisseisin*. The error assigned was, That the plaintiff had entered *pendente breve*, and in this action he is to be restored to the land.—But it was ruled, that he cannot assign this for error; for he cannot plead any thing in this action, especially it being a dilatory plea; but an *audita querela* is his remedy, if he have cause: and here the plaintiff is not to recover land, but to be resealed. Wherefore the judgment was affirmed.

CASE 13.

Milborne against Dashburne.

When rent shall commence from the time of possession.

10. Co. 107. b.
2. Brownl. 300.
1. Saund. 151.
2. Saund. 166.
1. Vent. 91.

TRESPASS. The case was, A reversion upon a lease for life is granted for life, *cum post mortem* of the tenant for life *acciderit*. The question was, If this shall refer to the commencement of the future time, as to the estate, or to have the land in possession?—And it was ruled, it shall not refer to the commencement of the estate, but to the having the land in possession. 23. Eliz. Dyer, 376. 17. Edw. 2. "Executors," 112.

1. Saund. 251, 152. Ld. Raym. 27. 525. 1. Salk. 233.

CASE 14.

Bishop against Grant.

Hilary Term, 35. & 36. Eliz. Roll 253.

Rent seek is well demanded on the land, though made payable at another place.

10. Co. 107. b.
Cro. Car. 508.
4. Bac. Abr. 351. 358.
Dengl. 423.

ERROR of a judgment in an assise of a rent seek in *Kenit*, where the plaintiff made his title, that the rent was granted to be paid yearly at the four feasts, *viz. Christmas, Annunciation, Saints John the Baptist, and Michaelmas*, and at another place out of the land; and sheweth, that the rent was arrear for four years at the *Annunciation* last past; for which the plaintiff, "*in crastino predicti festi Purificationis beate Marie*," demanded the said arrearages.—**FIRST ERROR**, That the rent was demanded upon the land, and not at the place where it was payable.—*Sed non allocatur*; for it is well demanded upon the land, and it is not like to a rent reserved upon a lease with a clause of re-entry.

The effect of the relative "*predictus*" when it does not refer to any certain antecedent.

Ant. 311.

SECOND ERROR. That it was demanded after the feast.—*Sed non allocatur*, that no feast of the *Purification* is mentioned before; so it appeareth not that the demand was after the rent was due, or before.—**FOSTER** moved, that this word "*Purification*" shall be void, and surplusage, and then *predictum festum* shall refer to the feast last mentioned.—**GAWDY**. Although the word "*Purification*" be void, yet *predicti festum* cannot refer to the last feast; for there are divers feasts mentioned, so it cannot be referred to any one certain: but the word "*Purification*" can be no more void than the word "*predicti*," shall be void, and the other to stand, *Comment. 86*.—And for this cause the judgment was reversed: but if it had been *et postea* after the said feast of the *Purification*, &c. it had been good; for all after the word *postea* shall be void. And for this cause the judgment was reversed.

Pipe

Pipe and Others against The Queen.

CASE 15.

Trinity Term, 35. Eliz. Roll 868.

ERROR by Pipe, as son and heir and executor of Sir R. Pipe, the bishop, and the incumbent, against the queen, upon a judgment in a *quare impedit* by the queen against Sir R. Pipe as patron, the bishop, and Bagshaw the incumbent, to present to the church of B. in the county of Derby, to which she made title to present by lapse, and recovered. Error assigned, For that the patron died *pendente breve*; and yet judgment was given against him. —And this was held by THE COURT to be a manifest error; for although the death of the patron shall not abate the writ, as *q. Hen. 6. pl. 30.* is; yet when judgment is given against him, it maketh all erroneous, and shall cause the judgment to be reversed in all, for it cannot be reversed by parcels. This error was confessed by the queen's Attorney.

In quare impedit, if the patron dies *pendente breve*, and judgment be given against him, the whole is erroneous. Cro. Car. 592. 2. Leon. 58. 2. Sid. 94. 7. Co. 26. b.

NOTA. All the others were summoned and severed, except Pipe. And this was held good; for as summons and severance shall be in a *quare impedit*, so in a writ of error upon it.

Summons and severance in a writ of error. 6. Co. 25. a.

But then it was moved, that this writ of error was not well brought by the plaintiff as heir and executor together. But THE COURT as to that held it good enough; as a writ of debt may be brought against one as heir and executor together. —But then it was moved, that he had no cause to bring a writ of error as heir, or as executor; for he cannot have it as heir, for the inheritance is not touched, for the queen only claimed by lapse, so affirmeth the inheritance; and as executor he cannot bring an action, for he hath no damage, for the testator had presented, and the incumbent was in the church; but if the testator had not presented, peradventure it had been otherwise: and here all the loss is to the incumbent, and he cannot reverse the judgment, for he is severed. —But THE COURT held, the writ of error did well lie; for it is to maintain the incumbent in the church: and the incumbent, although he be severed, yet shall of necessity have judgment to be restored; for the judgment is entirely to be reversed. —And Trin. 36. Eliz. the judgment was reversed; but it was not said at whose suit, viz. as heir or executor. And it was said the incumbent may well enter; for by the reversal there is no record of the recovery against him.

The son of a patron may bring error on judgment in *quare impedit*, as both heir and executor.

Buckly against Williamson.

CASE 16.

Hilary Term, 36. Eliz. Roll 246.

ERROR of a judgment in debt upon an obligation. The error assigned was, That the *teste* of the writ was 15. September, 32. Eliz. returnable O^{ct}ab. Michaelis, and the money was due at Mich. 32. Eliz. and so after the *teste*, and before the return of the writ; and this appeared by the condition, which was entered in *bet verba*. And for this cause, although the judgment was after verdict, so that if there had been no original it had been good, yet it being brought before cause of action, the judgment was reversed. and it is not aided by the statute of 18. Eliz. c. 14.

Judgment shall be reversed where the writ is tested before the cause of action. *Quare*, 1. And. 241. Hob. 199. Cro. Car. 575. Cro. Jac. 70. 4. Bac. Abr. 13. Comp. 454.

Doug. 62.

Allen's

CASE I.

If the king grant a forfeiture, the grantee may sue a *scire facias* in the king's name.
Ante, 44.

Dyer, 1.
Moor, 241.
Keilw. 168.
Savil. 133.
Owen, 113.
Cro. Jac. 179.

Allen's Case.

Easter Term, 36. Eliz.—In the Exchequer.

ASCIRE FACIAS was sued in the queen's name against *Allen*, why execution should not be against him for a debt that came to the queen by attainder of *J. S.* The defendant pleads, that the queen hath granted over this debt, and all actions and demands for it to *York*. And upon this it was demurred, if the suit could be in the queen's name, after it is granted over.

NOTA. In truth there were special words in the patent, that he might sue for it in the queen's name; but this was not pleaded. —And **THE COURT** held clearly, that if it had been pleaded, the suit might be in the queen's name; for the queen had this liberty to grant to sue in her name.

But if, as the case is pleaded, he might sue in the queen's name, the Court doubted. And two precedents were cited: the one, *Easter, 30. Eliz. Roll 291.* where *Green*, to whom a debt was due, was attainted of felony, and the queen granted over the debt, and all actions and demands for it, and a *scire facias* was sued in the queen's name: the other precedent was, *Hill. 32. Eliz. Roll 216.* *Mabb* was indebted by bond to *J. S.* and the debt came to the queen by attainder, and she granted it and all actions for it to *Bowes*, and, notwithstanding, the suit for it, was in the queen's name.—But the Court said, they would see the precedents. *Et adjournatur.*

CASE II.

Green against Edwards.

Hilary Term, 36. Eliz. Roll.

Quere, if a defendant shall answer to a second information while another for the same cause is pending.
Ante, 261.

Cro. Jac. 431.
Dougl. 240.

INFORMATION for converting 2000 timber trees into coals to make iron; and demanded 4800*l.* The defendant pleads, that the same plaintiff had another information against him for the same cause, and demanded the same sum; and demanded judgment, Whether he shall answer to the last, pending the first?

ALTHAM argued, he was not to answer; for when a declaration is made, and the certainty appeareth, there shall be no other suit for the same cause, for the double vexation to the defendant. 14. *Edw. 3. "Brief"* 318. 22. *Hen. 6. pl. 52.* 14. *Aff. 6. pl. 29.* 40. *Aff. 40. pl. 39.* 39. *Hen. 6. pl. 12. & 28.* 40. *Edw. 3. 35.* 39. *Hen. 6. pl. 14.* And there is no difference between the case of the queen (as it was objected) and of a common person; for the queen shall not have two suits for the same cause. 19. *Edw. 3. "Brief"* 470. & 33. *Edw. 3. "Brief"* 916. & 2. *Impedit*, 58. And if it should be suffered, the party shall be twice charged, and have no remedy; for an *audita quereia* lieth not against the queen. 18. *Edw. 3. pl. 2.* 45. *Edw. 3. "Brief"* 547.

COKE, Attorney General, *contra*; for it is but in the nature of a trespass. 5. *Hen. 7. 15.* and it is no plea in trespass, that another is depending; and the queen hath a prerogative above a common person. He offered to withdraw the first suit; but the defendant would not assent to plead to the second.

THE BARONS would advise; but they said it was not *peremptory*, but a *respondens ausier*.

Agard against Candish.

Case 3.

INFORMATION on the 8. Edw. 4. c. 2. for giving licences. Upon not guilty, it was found for the queen.

It was moved by TANFIELD, that the action lieth not in this court; for the statute appoints it to be sued in certain particular courts therein mentioned, and there is no word of the exchequer.

ATKINSON *contra*. The statute is in the affirmative, and not in the negative, that it shall not be sued elsewhere. *Stradling's Case* (a).

Sav. 134. Moor, 564. Noy, 117. 2. Hard. 420. 2. And. 127. 1. Bac. Abr. 598.

To this THE BARONS agreed; for this is a superior court, though not named; and so suit may be here; for there are no restrictive words in the statute: and this Court hath power to hold plea in any thing concerning the queen, if not restrained. *Et adjournatur*.

The jurisdiction of the exchequer in matters relating to the crown, can only be taken away by express negative words. (a) Plowd. 208.

Hitchcock and Uxor against Skinner and Lacy,

Case 4.

SHERIFFS OF LONDON.

DEBT upon an escape of *Lyfster*, who was taken in execution.

And declared, that whereas the plaintiff, as executor of one *Bevill*, brought an action of debt against *Lyfster*, and recovered and had execution, the defendants suffered him to go at large, and counted in this action in the *debet et detinet*. The defendants pleaded *nihil debent*; and found for the plaintiffs.—It was moved

in arrest of judgment, that the action was not well brought in the *debet et detinet*; for as the first action was only in the *detinet*, so this action grounded upon the record ought to be, and to pursue

it. 10. Hen. 7. pl. 5. b. 11. Hen. 6. pl. 17. 9. Hen. 6. pl. 11.

20. Hen. 6. pl. 4, 5, & 6. where an executor brings debt for arrearages of account found before auditors assigned by himself. So in all cases where an executor sueth for any thing due to the testator, or by reason of any such thing: as if an executor recover damages in trespass, *de bonis testatoris asportatis*, and recovers, and then brings debt for the damages, it must be in the *detinet*; and in *Scroggs v. Lady Gressam*, 27. Eliz. C. B. where she was executor to her husband, and sold lands by virtue of an act of parliament to pay her husband's debts, it was adjudged she shall be charged only in *detinet*; and if a recovery should be in this action in the *debet et detinet*, it shall not be to the use of their testator, but of themselves.

PERIAM. This action is grounded upon a *tort* done to themselves, and is not grounded merely upon the record; and is not like the cases put of debt upon arrearages of account, or upon a recovery, but is merely collateral, for the *tort* done by the sheriffs in suffering the party to escape; yet when it is recovered it shall be assets in their hands, and the action in the *debet et detinet* is well brought.

EWENS and CLERKE *contra*; for the ground of the action is the recovery as executors, and the *tort* is done to them in that right; and therefore the action is to be brought in the *detinet* only.—And it was afterwards adjudged accordingly.

Debt upon an escape from an execution by executors, on a judgment in debt in the *detinet* only, must also be in *detinet*, and not in the *debet et detinet*.

Post. 350.

5. Co. 31. b. Cro. Jac. 545. Hob. 88. 134. 271.

Noy, 19. 2. Lev. 111. 2. Jones, 47. Lane, 80. 1. Sid. 397. 2. Bac. Abr. 23. 441. 5. Com. Dig. 208. 2. Term Rep. 126.

Trinity Term,

36. Eliz. In the Queen's Bench.

Sir John Popham, *Knt. Chief Justice.*Sir Francis Gawdy, *Knt.*John Clench, *Esq.*Edward Fenner, *Esq.*} *Justices.*Sir Edward Coke, *Knt. Attorney General.**Solicitor General.*

CASE 1.

Humble against Glover.

Hilary Term, 36. Eliz. Roll 420.

The bargaines of the reversion of a term cannot bring debt for rent against the lessee, after an assignment of the lease.

Post. 633. 636.

Poph. 55. 120.

Gouldf. 182.

Moor, 351.

Jones, 44.

Dougl. 183. 188.

DEBT upon a lease for years, made by *Tho. Play* to the defendant. And declares upon an assignment of the reversion by indenture of bargain and sale enrolled. The defendant pleads, that after the grant of the reversion, and before any rent arrear, he assigned over his term to — *Scotmead*, and doth not name his christian name; but a blank was left for it. Upon this plea it was demurred.

FIRST POINT. If the lessee shall be charged with the rent after the assignment of his term?—And resolved he should not. *Vide 3. Co. 23. b.* for there is 'no privity between the bargainee and lessee, but by reason of the privity of estate, which being gone, the lessee is not chargeable: but between the lessor and lessee he shall not discharge himself, by assigning over his term; for the privity is by reason of the contract and reservation, rather than by the occupation of the land; which by his own act he shall not discharge: but in this case the privity is destroyed.

A grant omitting the christian name of the grantee is void. Ante, 57. 59.

Co. Lit. 3. a.

Cro. Jac. 558.

SECOND POINT. It was moved, that the plea is not good; for a grant to one not naming his christian name is void: for it is uncertain to whom the grant is, except the grant be to one who, by reason of his dignity or office, it is known there is no other of the same name; as "to *POPHAM, Chief Justice,*" or "*GLANVILLE, serjeant;*" and yet in that case it must be averred that there are no more of that name: and if an obligation or grant be made to one, and his christian name is mistaken, the grant is void; so a grant made by him, *a fortiori*, where there is no christian name.—And of that opinion was **ALL THE COURT**, except **FENNER**, and that the plaintiff shall have judgment to recover: but no judgment was given, because the plea was discontinued.

CASE 2.

Brooke against Clarke.

Easter Term, 36. Eliz. Roll 397.

Slanderos words which affect a man's profession are actionable; and though a verdict is found generally where some of the counts

are for words not actionable, it shall be intended that the damages were on the good counts, except the words are laid at different times. Ante, 282. 1. Roll. Ab. 376. Cro. Car. 328. 1. Lev. 134. 40. Co. 130. Moor, 142. 1. Bull. 37. 3. Bull. 283. Cro. Car. 237. 328. March. 48. 1. Sid. 38. Winch. 33. Dougl. 377. 730.

ACTION for words. For that whereas **CLARENCEUX**, king of arms, had a patent of his office; and that he might grant commission to any to be his deputy, to visit in things concerning his office; and he by his commission did appoint the plaintiff to be his deputy in the counties of *Devon* and *Somerset*; and the plaintiff by virtue thereof did sit and enquire of matters concerning the office; the defendant, *premissorum non ignarus*, said of the

plaintiff,

plaintiff, "He came and sat by force of a forged commission; and "he is a scrivener and no HERALD." The defendant pleaded not guilty; and it was found against him. And it was now moved in arrest of judgment, First, That the words would not maintain an action. Secondly, If some of the words were actionable, yet others of them were not; and damages were *entirely* given.

BROOK
against
CLARKE.

To the first, THE COURT conceived that the action lieth; for they touch him in his profession, and are very slanderous, that he sat by virtue of a forged commission. And whereas it was objected, that peradventure he did not know it, it is expressly averred by those words, *præmissorum non ignarus*: but if those words had not been in the declaration, it had been otherwise; for it might be that he sat by virtue of a forged commission, and knew it not, and then it touched him not in his credit. And the words, "he "is a scrivener, and no herald," touch him in his profession, for by it he getteth his living; and therefore it is reason that for them he might bring his action.

And as to the second, all THE JUSTICES held, that judgment shall be given for the plaintiff; for it shall be intended that damages were given for the words which were actionable.—But POPHAM said, that if an action be brought for words spoken at one time, and for other words spoken at another time; and for the words spoken at one time an action lieth, but not for the words spoken at the other time, and damages are entirely assessed, no judgment shall be given; for the action is brought for all the words, and damages for all. And so it was held in the *Lord Admiral's Case*, 18. Eliz.—And afterwards judgment was given accordingly.

Ante, 282.
10. Co. 130, 131

Chapman against Thumblethorp.

CASE 3.

Hilary Term, 36. Eliz. Roll 113.

TRESPASS for breaking his close, *et quædam averia ibidem existens cepit et asportavit*. The defendant pleads, that the cattle were his own goods, and that J. S. took them by wrong, and put them in the plaintiff's close by his assent; for which, he finding them there, did take them, &c. as it was lawful, &c. And upon this plea it was demurred.

Where goods are wrongfully taken from the possession of another, the owner may justify the retaking them wheresoever he finds them.

PUDZEY argued *for the plaintiff*, that the defendant could not enter into the plaintiff's close to fetch them out, except they were put there by the plaintiff's *sort*: and this plea doth amount to a general issue; for he cannot traverse the property of the goods,

2. Roll. Ab. 569.
Bro. Tref. 323.
Cro. Jac. 366.
3. Bl. Com. 4, 5.
Dougl. 747.

But THE COURT held it a good plea; for the plaintiff by his declaration doth not aver the property of the goods to be in him, but saith only *quædam averia*. And when the defendant's beasts are taken from him by wrong, and are not out of his possession by his own delivery, he may justify the taking of them in any place he finds them. And it was adjudged for the plaintiff (a).

(a) Defendant, L. C. B. PARKER'S MSS.

Halslop

CASE 4.

Haselop against Chaplin.

Ante, Page 257. Case 36.

Costs shall be allowed to an avowant for an amercement.

Ante, 257. 300.

Cro. Jac. 28.

520.

Cro. Car. 497.

532. 2. Com.

In replevin, if

the writ be "de

"averiis," and

the count of "a

"borse," the va-

riance is fatal.

Dig. bk. 9. c. 5.

IT was now moved again, and divers precedents were shewn out of the common pleas, that always since the statute damages and costs had been given to the avowant in avowries for amercements in leets, and for heriots, and other cases not mentioned in the statute.—And THE JUSTICES conceived that their course being so since the statute, the law shall be construed to be so; and so inclined in their opinion.

Dig. 548. 1. Bac. Ab. 522. 2. Ld. Ray. 788. Dougl. 709. 2. Term Rep. 235.

But then it was moved, that the replevin was *de averiis* taken, and the taking was only of a *borse*, and so ill—And of that opinion was THE COURT, that the count had made the writ false. And for this cause (a) the judgment was reversed.

Cro. Car. 534. 2. Vent. 153. 2. Salk. 658. 701. 4. Mod. 246. 6. Mod. 303. Theo. Dig. bk. 9. c. 5. 3. Willf. 141. 5. Com. Dig. 24. 2. Willf. 394. 2. Ld. Raym. 1209.

(a) Sed vide Jones, 435.

CASE 5.

Dickins against Marthal.

Easter Term, 35. Eliz. Roll 403.

A devise of "all

"my lands and

"goods, after

"my debts and

"legacies paid,

"to A. and B.

"my children,

"equally to be

"divided be-

"tween them,"

passes an estate

for life only in

jointenancy.

Ante, 9.

Post. 443. 696.

3. Co. 29. b.

Co. Lit. 9. b.

42. a. 190. b.

2. S. d. 53.

Moor, 594.

Gould. 182.

3. Com. Dig. 34.

2. Vern. 722.

Gibb. Dev. 37.

1. Peer. Will. 19.

Salk. 391.

Swinb. 31.

12. Mod. 296.

Ld. Raym. 622.

631. 853.

2. Peer. Will.

280. 3. Brown P. C. 297.

1. Brown. Cal. Ch. 240.

THE case upon special verdict was, *J. Toby* devised all his lands and goods, after his debts and legacies paid, to *R. Toby* and *Mary* his children, *equally to be divided* between them.

The questions were, First, Whether an estate of inheritance or only a freehold passed by those words? Secondly, If they were jointenants or tenants in common?

And after argument THE COURT resolved, First, That an estate for life only passed; for although the devise of the lands and goods are coupled together, and it be a devise for ever of the goods; yet for the land, there being no words to pass the inheritance, only an estate for life passeth. And although it was objected that the devise of the land is, after his debts and legacies paid; so this is limited after he hath made an end of disposing any thing; and it was to his children, of which his heir is one; so that he intended to give as much to one as to the other; and that he doth not limit any estate over to any other; yet THE COURT held, that only an estate for life did pass.—POPHAM said, it may be doubted if any land did pass, in case he had a term for years in lands; and so the devise of land may be supplied, and that only the term shall pass.

Second Point. They all conceived it was a joint estate, and that they shall not take by parts in common; for he doth not appoint a division to be made.—But FENNER said, that in 2. *Eliz. Hide v. Southcot*, it was adjudged, that a devise of land to two equally divided, this was a tenancy in common. But here it is to two equally to be divided; and it is not certain that a division shall be made.

3. Term Rep. 596.

CASE 6.

Barry against Stanton.

A devise is a breach of a condition not to alien.

Ante, 60.

Post. 331.

Gould. 49. 184.

Poph. 106.

Dyer, 43.

THE case upon special verdict was, "A lease was made for years upon condition he shall not devise the land, or assign over his term; and by his will he devised it."

GAWDY, FENNER, and CLENCH, held clearly, that the condition was broken; for by this devise the term is disposed by his gift, which is an alienation, and is as strong as any other alienation.

—But POPHAM delivered no opinion.

4. Co. 119. Dougl. 57. 184. 2. Term. Rep. 425.

Kent against Sponder.

CASE 7.

SCIRE FACIAS to have execution of land, and damages recovered in an *ejectione firmæ*. The defendant pleaded an entry into the land after the judgment, and before the *scire facias*.—And because he did not answer to the damages, the plea was ruled ill in all. Wherefore it was adjudged, that the plaintiff shall have execution of the land, and damages.

Plea to a *scire facias* must answer the whole matter.

Ante, 268.

1. Saund. 27.

2. Saund. 127.

Cro. Jac. 27. 1. Term Rep. 382.

Patridge against Mayler.

CASE 8.

ERROR upon a judgment in an action upon the 1. & 2. *Philip & Mary*, c. 12. for taking a distress in one county, and in charging and impounding it in another county. The *venire facias* awarded only of the place where the taking was. This was assigned for error.—And for this cause the judgment was reversed (a).

Judgment reversed for mis-awarding the *venire facias*.
Post. 480.

3. Levinz. 43.

(a) Vide ante, page 260, Note (a), to Case 46.

Harvey against Wroth.

CASE 9.

ERROR upon a judgment in dower. Error assigned was, That the tenant was an infant, and the judgment was by default. *V. 5. Edw. 3. 70. 17. Edw. 3. 47. 17. Edw. 2. "Saver Default," 80.* where an infant shall be compelled to save his default. It was moved here, that inasmuch as in a writ of dower the parol shall not demur for his nonage, that the infant shall be compelled to save his default; and so it was cited to be adjudged in *Corie's Case*, 34. Eliz.—*Sed adjournatur*.

In dower against an infant the parol shall not demur.
Ante, 308.
Post. 557. 567. 638.

Cro. Jac. 111. 392.

Moor, 463. 2. Brownl. 118.

Berry against Taunton.

CASE 10.

Hilary Term, 36. Eliz. Roll 376.

THE case upon special verdict was, "A lease was made to *Giles Taunton* for eighty years, upon condition that if he, his executors, or assignees do demise the lands for more than from year to year, that then the lease shall cease and be void. *Giles Taunton* doth devise it to his son, and dieth; the son enters by the assent of the executor."

A condition by a lessee that he will not demise for more than from year to year, is broken by a devise of the lease to his son.

Ante, 60.

Poph. 106.

4. Co. 119.

Dyer, 45.

Dougl. 57. 134.

2. Term Rep. 425.

The question was, If the condition be broken? for the devise is not properly a demise.

But all THE JUSTICES held it a breach; for a condition shall not be taken so strictly, that it shall be according to the precise words; and if the meaning be broken, it is a breach of the condition; and none will deny but a grant of all his estate had been a breach: so it is here of a devise. And it was so adjudged.

Lee against Norris.

CASE 11.

Easter Term, 36. Eliz. Roll 41.

EJECTIONE FIRMÆ, The plaintiff declared of a lease by *J. S.* The defendant said, that long time before the lease and ejectionment, the queen was seized of the land, and let it to *B.* for years, who let it to the defendant for two years; upon whom *J. S.* the lessor of the plaintiff entered, and expelled him, and let it to the plaintiff. And upon this it was demurred, because the plea amounts to non-guilty,

If a stranger enters upon the king's lease, he gains a possession without taking the reversion from the crown.

GAWDY

LES
against
NORRIS.

2. Leon. 306.
Run. Ejeq. 15.
But now by
9. Geo. 3. c. 16.
a possession of
60 years, except
to liberties and
franchises, will
be a bar even to
the king's pro-
rogative in this

GAWDY.—The plea is good; but if it had been in the case of a common person, it had not been good, without saying, "he ousted the lessee, and disseised the lessor;" but here there can be no disseisin to the queen; wherefore he saith enough, "that he put out the lessee," for otherwise it is not good, 10. *Edw. 4. pl. 6.* for otherwise his entry may be intended lawful. But when he saith, "he expelled him," this intendeth an unlawful entry, and confesseth in him such a possession, that he may make a good lease against any but him that hath right.—FENNER agreed; and by this entry he hath gained such a possession, that the lessee of the queen may bring an *assessio firmæ*, although the queen be not put out of the freehold; which POPHAM agreed.

respect.—See also 12. Jac. 1. c. 16. 3. *Bac. Abr.* 172.

CASE 12.

Nevill against Seagrave.

Trinity Term, 33. Eliz. Roll 323.

Tender of
amends for da-
mage fait is good
after impound-
ing.
Post. 813.

REPLEVIN. The defendant avows for damage-feasant. The plaintiff replieth, that the day after the distress taken, he tendered sufficient amends, *scil.* sixpence, which the defendant refused; upon which the plaintiff demurred, because the tender was not before the impounding.

5. Co. 76. a
contra.
3. Co. 147.
Heil. 16.
Cro. Jac. 377.
Hob. 154.
3. Bl. Com. 15.

GAWDY.—The tender is good, although the cattle be impounded; and if the party that distrained refuseth it, the owner may take them out of the pound. And it is clear, if the tender were before the impounding, he might take them.—*Quod fuit concessum.* Whereupon THE COURT gave day to the defendant to shew cause to the contrary, otherwise judgment shall be given for the plaintiff.—But TANFIELD at the bar said, it was adjudged in *Sir Henry Cromwell's Case* in the common pleas, that tender after impounding cometh too late.

CASE 13.

Dr. Andrews against Wood.

In debt on bond
conditioned for
the payment of
rent on an ex-
press covenant,
it is not neces-
sary to alledge a
demand.
Post. 829.
Cro. Car. 76.

DEBT upon an obligation. The condition was to perform covenants in an indenture of lease, whereof one was to pay the rent at the day; the breach assigned was for non-payment of the rent. Upon which it was demurred, because no demand of the rent was alledged.—But THE COURT over-ruled it, because it was an express covenant; and by the recovery the obligation is determined. *Sed adjournatur.*

CASE 14.

Lambert against Austin.

Trinity Term, 35. Eliz. Roll 185.

Quære, if the
executor of a te-
nant for life of a
rent-charge may
distrain upon him
in reversion for
arrearages incurred
in the life of the
testator?
Post. 547.

REPLEVIN. The defendant avowed upon the 32. *Hen. 8. c. 37.* as executor; for that *Lady Southwell* was seised in fee of the manor of *Weston*, and 3. *Eliz.* granted a rent of 5l. *per annum* to *Richard Adamson* for his life, issuing out of the manor, who made the defendant his executor, and died 28. *Eliz.* and for ten years arrearages between 17. & 28. *Eliz.* he avowed. The plaintiff replied, that after the grant, *scil.* 12. *Eliz.* *Lady Southwell* made a feoffment of this manor to *Copley*; who 13. *Eliz.* let the land to *Brocket* for twenty-one years, who occupied it for the term, which

Cro. Car. 471.
Ld. Raym. 172.
5. Co. 138.

See Mr. Hargrave's Co. Lit. 162, a, note (4) and b, note (1.) 1. Leon. 302. 2. Vern. 612.

expired

expired 34. *Eliz.* and afterwards Copley let it to the plaintiff for three years; upon whom the distress was taken: and upon this it was demurred. The question rests only for the rent incurred during the term, if by the statute he may distrain for it after the term expired upon him in the reversion: for the statute is, that he shall distrain upon the possession of the tenant in demesne which was chargeable with the rent, or any claiming under him.

LAWBERT
against
AUSTIN.

GAWDY and FENNER, Justices. The tenant of the freehold is only to be charged, for an assise only lieth against him, and he is the party that is to attorn; and the lessee for years is only chargeable for his cattle being upon the land, as a stranger shall be in that case; and the intent of the statute was only to give remedy against him who was chargeable in the life of the testator. And FENNER said, if lessee for life grants a rent-charge, and then makes a lease for years, and dieth, debt lieth for this rent against the executors of the tenant for life, and not against the tenant for years, for he is not the party chargeable; and in this case, if no seisin was had, there is no remedy: for tenant for years cannot give seisin, and a release of this rent must be to the tenant for life, and not to the tenant for years.

CLENCH and POPHAM contra. That the tenant for years is only chargeable in debt for the rent incurred during the years, and not the tenant of the freehold; and both are chargeable, one with an assise, and the other with a distress during the estate. Then it is to be considered in this case, who is chargeable by the intent of the statute. If tenant *pur autre vie* grant a rent, and *cestuy que vie* dieth (a), the grantee of the rent dieth, the executors of the grantee have no remedy by the statute; for the statute giving the distress intends the party that properly and usually is to be distrained, which is the termor in possession, and those that come in privity under him: but so is not he in the reversion; and therefore in this case the executors cannot distrain, but only have an action of debt; and the statute giveth the distress upon the tenant in demesne, which is chargeable immediately, and not on him in the reversion, except his cattle come upon the land by escape.

(a) The statute
extends to all
tenants for life.
Co. Lit. 162.

FENNER. If tenant in tail grant a rent-charge, and then makes a lease for years according to the statute, and dieth, the issue shall hold it discharged, and the grantee shall not distrain during the term. *Quod GAWDY concessit. — Et adjournatur.*

Folcot against Ridge.

CASE 19.

PROHIBITION for suing for tithe-hay upon fifteen acres of land, ten acres of meadow, and seven acres of pasture: And surmiseth, that he and all those, &c. time out of mind, &c. had used to pay four-pence yearly in satisfaction of all tithes of hay cut there, &c. and issue upon it. The jury find the prescription, but that part of the land was never mowed, but shew not what part in certo. The question was, If this verdict be certain enough; and for whom it was found?—And it was adjudged for the plaintiff; for both parties are agreed, that all the land had been mowed, and the finding contrary to it is void; and the verdict is certain enough.

If a modus be
found, though it
differ from the
suggestion, the
verdict is good.
Ante, 238.

1. Term Rep.
427.

Anneley

CASE 16.

Annelly against Stokes.

Judgment reversed for variance between the writ and the declaration.

Cowp. 178.

Doug. 194-402.

ERROR upon a judgment in debt. For that in the writ he was named "son and heir apparent," and in the declaration, "son and heir" generally.—And for this variance the judgment was reversed.—Yet it was said, that "apparent" was surplusage. *Sed non allocatur.*

1. Term Rep. 237.

Trinity Term,

36. Eliz. In the Common Pleas.

Sir Edmund Anderson, *Knt. Chief Justice.*

Sir Francis Beaumont, *Knt.*

Thomas Walmsley, *Esq.*

Thomas Owen, *Esq.*

} *Justices.*

Sir Edward Coke, *Knt. Attorney General.*

Solicitor General.

CASE 1.

Frederick against Frederick.

A. levies a fine to the use of B. for life, and after to the use of the children of C. procreatis.

C. had two sons living at the time; and before the death of B. had issue two daughters. —Adjudged that the postnates shall not take.

Ante, 121.

6. Co. 17. a.

Jenk. Cent.

248.

Moor, 718. 720.

2. Co. 91.

Pop. 3.

1. Co. 130.

Co. Lit. 9. a.

2. Salk. 675.

PARTITION. The case was upon special verdict. "*A. levies a fine to J. S. which by indenture is declared to be to the use of B. for life, and after to the use of the children of C. procreatis: C. at the time of the limitation had two sons, and before the death of B. had issue two daughters.*" The question was, If the daughters should take?

After argument at the bar, it was resolved by THE COURT, (except OWEN) that the daughters should not take.—ANDERSON first shewed his opinion, that the *postnate* shall not take; but only the children that were *in esse* at the time of the limitation; for they shall not take as jointenants, nor as tenants in common, nor by way of remainder; and therefore not at all: as jointenants they cannot take; for they were not in being at the time of the limitation of the remainder; nor as tenants in common or by remainder, no more than they could take by an estate executed by other conveyances: and uses are not allowable, but as they are consonant to the rules of law and reason; and it is plain here, that no present or future uses are limited to those that should be afterwards born, and no matter can be collected out of the parties intent to help them.

WALMSLEY accorded. This rule is to be observed in uses. In every case there is to be donor and donee, who shall take as well in limitation of an use, as of an estate executed: and although the common law knows nothing of uses, yet now by the statute an use is an estate; and to take such an estate; there ought

to be a donee. As if a gift be made to the father, *et primogenito filio*, if he hath no son then, the son born afterwards shall not take, and the use ought to be observed as it is appointed; and when it is limited in possession, it must take in possession, and in future, and in expectancy when it is so limited; but there must be a donee to take at such a time as it is limited (a). And where it was objected, that the intent and meaning of the uses is to be observed, it is true, if they be not fond and idle, as in wills, which are greatly favoured for the weakness of them that make them. And it is against the rules of law and reason, and of uses, that one who is not *in esse* should take by an use limited in possession; and therefore the sons *in esse* shall only take it in this case, and not the daughters born after. And in the earl of Bedford's Case, it was ruled by the advice of the Justices in the court of wards, that where he made a conveyance to the use of himself for years, the remainder to his eldest son in tail, the remainder to the heirs of the earl, although his meaning was (as it appeareth by the words) that his heir should take as a purchaser; yet it was ruled according to the rules of law, and not according to his meaning; *scilicet*, that he should take it as a fee executed in himself. And it seemeth, that if a limitation be to the right heirs of F. S. and he hath issue a daughter, and dieth his *feme ensuient* with a son, who is afterwards born, yet the daughter shall retain it, for she was in the estate executed.—BEAUMOND agreed in omnibus.

FREDERICK
against
FREDERICK.
1. Co. 100.
1. Aff. 11.
Plowd. 296.
2. Roll. 417.
1. Roll. Rep.
335.
Owen, 152.
(a) Vide Harg.
Co. Lit. 9.
a. note (3)
where from
Hall's MSS.
it is said the
father takes the
whole fee simple.

OWEN *contra*: for the intent here appeareth, that all the children shall have it; for *procreatis* referreth to those that were born, as to those that shall be born; and an use is a matter of conscience.—But it was adjudged by the other Justices against the daughters.

Ante, 321.
Moor, 741.

The Lord St. John against Talbot.

CASE 2.

FORFEITURE of marriage. And counts, that the father of the defendant held of him by knight-service and died, the defendant, his heir, being within age; whereupon the plaintiff tendered him a marriage; and he refused and married himself elsewhere, and at his full age intruded; the double value of his marriage not being satisfied. The defendant acknowledging the tenure and marriage, traverseth the tender. And it was thereupon demurred; and ruled, that the tender is chiefly traversable in this case.

In what cases
tender of mar-
riage is traver-
sable.
Post. 468.
Co. Lit. 82.
Cro. Jac. 66.
5. Co. 126.

But THE COURT held, that in a *valore maritagii*, the tender is not traversable, for the lord shall have it without tender.—ANDERSON and WALMSLEY held, that if the heir marry himself before tender, the lord shall have only *valorem maritagii*, and not the forfeiture; for the tender afterwards, when he is married, is in vain, for he cannot accept of it, and it shall not gain to the lord the double value (a).

(a) This tenure by knight service is now wholly taken away by 12. Car. 2. c. 24. and converted into *free* and common *scage*.

CASE 3.

Gurney and Somes' Case.

A Sheriff shall be allowed 12d. in the pound for the first 100l. and 6d. for every pound above 100l.; and for non-payment he may bring debt. Post. 654. Cro. Car. 287. Cro. Jac. 103. 5. Com. Dig. 598, 599. 2. Term Rep. 148. 155.

DEBT for 35l. for their fees, as sheriffs of London, for executing a *capias ad satisfaciendum* directed to them; and demanded by force of the 29. Eliz. c. 4. twelve-pence in the pound for the first one hundred pounds, and sixpence in the pound for the residue. It was thereupon demurred.—First, Because there is not any action given by the statute.—Secondly, Because they ought to have but sixpence in the pound, where the sum exceeds fifty pounds, and not to take twelve-pence in the pound for the first one hundred pounds, and sixpence for the residue.—And so THE COURT held upon the first argument in both points.—*Sed quare, quia adjournatur.*

CASE 4.

Ferrer against Johnson.

A variance between the declaration and the finding of the jury in a matter not essential to the nature of the action, is immaterial. Ann. 288. Co. Lit. 233. b. Post. 839. Bull. N. P. 76. Dougl. 194. 402. 665. 1. Term Rep. 238. 11. Co. 4. 2. Cro. Car. 279.

ACTION upon the case, for disturbing him of an office. The plaintiff made a special title to it, and a special verdict was found, wherein a title variant in part from that which was alleged, was found.

And after divers arguments it was held PER CURIAM, that notwithstanding the variance, the plaintiff should have judgment: for WALMSLEY said, that the title in this action was superfluous, and the variance found was not material.

And it was held PER CURIAM, that if one grant an office of bailiff or steward, or the like, with the profits thereof, without rendering an account, he cannot discharge the grantee, but he shall continue to have the profits of the office; but otherwise it is, if no fee or profits had been granted for the exercising thereof.—And WALMSLEY held, that one may grant an office, *habendum* after the death of J. S. for it varieth from the case of land, &c. And the plaintiff had judgment.

36. & 37. Eliz. In the Queen's Bench.

Sir John Popham, *Knt.* Chief Justice.Sir Francis Gawdy, *Knt.*John Clench, *Esq.*Edward Fenner, *Esq.*

} Justices.

Sir Edward Coke, *Knt.* - Attorney General.Sir Thomas Fleming, *Knt.* Solicitor General.

Ro. Blackwell against Eyre.

CASE I.

Hilary Term, 36. Eliz. Roll 404.

ASSUMPSIT. And declared; *quod cum quidam exitus in quidam actione eject' firmæ* of the lease of Blackwell the plaintiff, *junctus fuit inter Anth. Buxton querent' et R. Senior et Geo. Nedham et Hen. Bradly* defendants; *ad quem exitum triandum*, the said *Anth. Buxton* had sued out a *venire facias*; the defendant, in consideration that the said *Anth. Buxton* and *R. Blackwell* the plaintiff, *ad triandum exitum prædict' parcarent inforciare* their title; *sed darent tenuem et parvam evidenciam super triationem exitus versus præfat' R. Senior, Geo. Nedham, et Hen. Bradly*, assumed to pay to the plaintiff two hundred and seventy pounds; *scil.* twelve pounds at the feast of *St. Michael* next ensuing, and twenty-four pounds at every other feast of *St. Michael*, until the two hundred and seventy pounds were paid; and if default of payment should be made of any of the said several sums by the space of one month, then he would pay for every month after such default twenty shillings *nomine pænæ*; and alledged in fact, *quod exitus prædict' triatus fuit*; and that the said *A. Buxton* and the plaintiff spared to enforce their title, and gave but small evidence *super triationem exitus prædict'* against the said *R. Senior, G. Nedham, et H. Bradly*, *sic quod juratores jurati ad triandum exit' prædict' dixerunt*, that the said *R. S. G. N. et H. B.* were NOT GUILTY; and alledges in fact, that the defendant did not pay the said twelve pounds at the feast of *Michaelmas* aforesaid, and that thirty-four months are passed since the said feast, after the said feast, till the tenth of *June*, 35. *Eliz.* and that the defendant had not paid the said twelve pounds at the said feast of *St. Michael*, 32. *Eliz.* nor within one month after, nor the thirty-four pounds forfeited *nomine pænæ*; and for the non-payment, &c. he brought his action. The issue *non assumpsit*. The jury find a special verdict; that in the said first action of *ejectione firmæ* there were two issues joined, *sc.* *R. S.* pleaded "not guilty," and *G. N.* and *H. B.* pleaded "a surrender of the term;" and issue upon them; *et si super totam materiam, &c.* The question was, If this verdict be for the plaintiff or the defendant?—It was moved, that the word *exitus* was a general word, and might be referred to both the issues; and so is good *reddendo singula singulis*, and relied upon 28. *Edw. 3. pl. 97.* 41. *Edw. 3. "Brief."* 4. *Hen. 6. pl. 11.* But it was answered; that although *exitus* be general, and may be referred to divers issues, yet it being coupled with *quidam*, this restrained it to one; and *junctus fuit* is in the singular number, and sheweth it cannot

BLACKWELL
against
EYRE.

Post. 427.

1. Com. Dig.
333.

1. Salk. 384.

be intended to refer to more issues. And the plaintiff afterwards sheweth that *exitus prædicti triatus fuit*: and that the jurors said, that they three were not guilty, sheweth his intent to be, that but one issue was joined; and the verdict findeth the contrary to it; and so he hath failed of his consideration.—But THE COURT held, that the words *quidam exitus* being general, shall refer to both; and in this it may be intended, that they meant both; and in that it is afterwards said, that the jury found them not guilty, this is but nugation; and he needed not to have spoke of the verdict, and so is not material: and of that opinion was THE WHOLE COURT. *Et adjour*.—At another day it was moved again, POPHAM and GAWDY being absent. And CLENCH and FENNER held their former opinion.

And then another matter was moved, that it was not shewn how long the payment of the twenty shillings should continue; for it is not said, *quousque* the plaintiff shall be satisfied.—But they held it not material, for it shall be intended till they be satisfied: and they gave judgment for the plaintiff, and said he might have a writ of error if he would.

CASE 2.

Button against Wightman.

A grant by such a college "in *Academiâ*" *Oxon*, shall not be avoided for the misnomer, although the college was not named "in *Academiâ*" in the charter of incorporation, but in "*Oxon*" only.

EJECTIONE FIRMÆ, for lands in Harrow, upon a lease by Lord North. Upon special verdict the case was, "38. Hen. 8. the dean and canons of *Christ-Church in Oxon* were incorporated by the name of THE DEAN AND CHAPTER OF THE CATHEDRAL CHURCH OF CHRIST, OXON, *ex fundatione regis Henry 8.* And 1. Edw. 6. they make a feoffment to Edward Lord North, by the name of THE DEAN AND CHAPTER OF THE CATHEDRAL CHURCH OF CHRIST in *Academiâ Oxon ex fundatione Regis Hen. 8.* Afterwards, 12. Eliz. they make a lease of the land for years, by the true name of their corporation to the defendant." And the jury find further, "that the city of Oxon, and the university of Oxon, *sunt unum et idem in circumspectu*; but the liberties of the university extend further than the limits of the city."—The question was, If this addition "*in Academiâ*" be such a misnomer as shall make the feoffment void?—FENNER. This misnomer is a material variance, for the place of the name of a corporation is material; for a corporation cannot be without a name, and *Oxon, et Academiâ Oxon*, are diverse, *quæ in uno cadere non possunt*, although both contain the same thing. As a grant to an abbot, and all the persons of the convent, or to a mayor, and all the persons of the corporation, is not good, 13. Edw. 4. 22. Edw. 4. for it is not by the name of their corporation; and it is no addition to name one of the university of Oxon; and that they are both of the same content, is not material.—POPHAM, CLENCH, and GAWDY, *contra*. We all agree there must be a local place of a corporation; and so it is here, though not so precisely; and the recital of the local place by another name is good; and it is not necessary to recite the place by the very letter of the place. 44. Edw. 3. pl. 16. a recovery was had against the prior of the Hospital of St. John's of Jerusalem; and in a *scire facias* upon it, the word Hospital was omitted, yet held good. L. 5. Edw. 4. 20. the Case of the Abbot of York, &c. Oxon, and the university of Oxon, are by intendment both one, and so are in common knowledge. 28. Hen. 6. pl. 8. the Case of

10. Co. 125. 2.

Prior, &c. And if a corporation be made of a town, and then it is made a city, and they grant land by the name of a city, it is good. —And by POPHAM: An university is as much a local place as a town, and there be divers colleges founded in *Academia Oxon*; without any other place; which doth prove it is a local place, and is all one with the city. And there is a great diversity in the name of a corporation, between the name before the place, and after of the place; for that which is precedent before the place ought to be precisely observed; but in the name of the place, it is sufficient if it be shewn by circumstances. And therefore *Oxon* and the *University of Oxon* being both one in common knowledge and speech, and well known; a grant shall not be avoided by this *misnomer*. —And judgment was given for the plaintiff, and the defendant immediately brought a writ of error.

Jordan against Cleabourne.

Easter Term, 35. Eliz. Roll 144.

EJECTIONE FIRMÆ, of the third part of a close called *Gat-bouse* close. After verdict for the plaintiff it was alledged in arrest of judgment, that an *ejectione firmæ* lieth not of a close, although a name be given to it; for it is in the nature of a *præcipe* of land, which ought to be of a certain number of acres. —POPHAM and GAWDY. It is but a personal action, and a trespass in its nature; and although an *habere fac' possessionem* lieth upon it, yet a name being given to the close, the sheriff may well take cognizance of it; and in 22. *Eliz.* it was so adjudged. —CLENCH and FENNER, *contra*; for all the precedents are, that it should be demanded by a certain number of acres. *Et adjourn*. —In the same Term, in *Palmer v. Humphry*, which is entered *Trinity, 35. Eliz. Roll 815*, an *ejectione firmæ* was of a garden called *Minchin's Garden*; of a meadow called *Dale Meadow*, and of a piece of land called *Minchin's Piece*; and being found for the plaintiff, it was moved in arrest of judgment, that an *ejectione firmæ* lieth not of a piece of land without shewing the number of acres. *Vide 5. Hen. 7. pl. 9. 45. Edw. 3. "Brief" 588. 11. Hen. 4. pl. 43.* and adjudged that the *ejectione firmæ* was well brought. But upon a writ of error, the judgment for this cause was reversed. —NOTA. *Easter, 38. Eliz. Roll 453.* in *Penn & Merevill*, **EJECTIONE FIRMÆ de una virgatâ terræ**; adjudged in the exchequer-chamber, that it lieth not.

BUTTON
against
WIGHTMAN

CASE 3.

The same exact description is not necessary in an *ejection* as in a *præcipe*; but it will not lie for land by any description without shewing the number of acres.
Sed vide ante,
235.
Post. 854.
Ley. 82.
1. Lev. 219.
Palm. 102.
Cro. Car. 435.
471. 573.
Moor, 222.
Owen, 18.
11. Co. 55.
1. Salk. 254.
Ld. Ray. 1470.
Str. 54. 1063.
1084.
B. R. H. 127.
1. Burr. 623.
Cowp. 349.

Ireland's Case.

3. Bac. Ab. 169. Dougl. 305.

CASE 4.

ERROR upon a judgment in a *replevin* in the common pleas. The declaration was in *Easter Term*: the defendant imparled, and afterwards pleads, and nothing done more in *Michaelmas Term*. In *Hilary Term* the plaintiff replieth, and they were at issue. After evidence, and before verdict, the plaintiff was nonsuited; but the jury gave a verdict for the damages. The plaintiff assigneth this for error, that it was a discontinuance. —THE COURT held it to be a manifest fault, and the plaintiff might assign it, though it was for his advantage. And it was held, that though a verdict was given for the damages, yet it is but in the nature of an inquest of office; and therefore it is a discontinuance not helped by the 32. *Hen. 8. c. 30.* or 18. *Eliz. c. 14.* as discontinuance after verdict found. The judgment was reversed.

A nonsuit in *replevin* after evidence, is not a trial within 32. *Hen. 8. c. 30.* though the jury assess damages for the avowant.
Post. 412.
Gouldf. 49.
Hob. 69.
1. Bac. Ab. 94.

CASE 5.

In B. R. if the record of the *poslea* and writ of *hab. cor.* are not properly certified, the judgment on them shall be reversed.

Post. 367, 368.
433. 466.
See the case of
Farc v. Denn,
1. Burr. 363.

Long against Michell.

ERROR of judgment in the common pleas. The error assigned was, That the judgment was given upon a verdict by *nisi prius*, and there is no record of the *poslea*, nor the writ of *habeas corpora* certified, nor in the custody of the *custos brevium*, which is the office for this purpose: and upon a writ of diminution it was certified accordingly. But it was alledged, that inasmuch as in the plea roll the record maketh mention, that the verdict was given and certified, and judgment given upon it, it is well enough; for this is the principal record.—But THE COURT held, that every officer hath his several charge, and their course is to be observed. In the common pleas the course is, that the plea roll shall be warranted by the record of the *poslea*, which is always to remain with the *custos brevium*; and when it is not warranted by it, it is erroneous. But in this court the plea roll is the chief record, and the *poslea* is entered in it, and judgment given upon it; and if the *poslea* be certified, and is afterwards lost, it is not much material. Therefore for this cause they held it error. *Sed adjournatur.*

CASE 6.

Ejection in Wales may be sued by plaint, and without using the words *vi et armis*.
F. N. B. 120.

Griffith against Williams.

Hilary Term, 36. Eliz. Roll 610.

ERROR upon a judgment in Wales in *ejectione firmae*.—First Error, That the words *vi et armis* are not in the declaration.—Second Error, The suit there was by plaint, whereas it ought to be by original.—WILLIAMS, *serjeant*. None of these are errors. For as to the first, it may be one way or other, 7. Hen. 6. pl. 4. 17. Edw. 3. pl. 1. and it is after verdict, and is but matter of form; and cited a precedent, Trin. 33. Eliz. *Lawfel & Spring*, that this is helped after verdict. And as to the second error, the 34. Hen. 8. c. 26. which appoints, that for lands in Wales the action shall be by original, is to be intended in real actions, in which lands are demanded, but this action is in the personality.—And THE COURT held, that judgment was to be affirmed. *Sed adjournatur.*

CASE 7.

Laurence Tanfield against Rogers and Watfon.

Easter Term, 36. Eliz. Roll .

A lease by tenant in tail of the scite and demefnes of a manor, *ac etiam totum illud manerium de A. & C.* reserving the ancient rent for the scite and demefnes, and another rent for the manor itself, is a good lease for the scite and demefnes; for the reservations being several, they are as several leases. S. C. Owen, 119. Ley. 74. 77. Cro. Jac. 458. 5. Co. 55. 139. 3. Bull. 290. Moor, 197. Co. Lit. 44. Cro. Car. 23. 3. Bac. Abr. 363. 4. Bac. Ab. 343. B. R. H. 246. 1. Salk. 390.

REPLEVIN for taking of cattle at *Clanfield* in com' Oxon'.—*Rogers* avows in his own right, and *Watfon*, as bailiff of *Chapman* and his wife, made cognizance for damages feasant, as in their freehold. The plaintiff said, that long time before the taking, *J. Edmunds* was seised of the manor of *Clanfield* in fee, and gave it to *Thomas* his son, and *Agnes* his wife in tail; and that *Thomas* died, having issue by the said *Agnes* two daughters. *Agnes* enters, and by indenture 25. Eliz. let to *J. Fox* the scite of the manor, and all the demefne lands of the said manor, and all other lands with it enjoyed by the said *Fox*; "*ac etiam totum illud manerium de Clanfield ac omnia terras et tenementa eidem manerio spectant.*" **HABENDUM** the said scite and demefnes, and also the said manor and premises, to the said *J. Fox* for twenty-one years, from the day of the date of the indenture, yielding and paying for the said

" scite

"scite and demesnes and premises therewith letten 3l. 6s. 8d. and yielding and paying for the said manor and premises there-
"with letten, 9l. 10s." and conveyed the estate of *J. Fox* to himself, and that he put in his cattle; and averred, that the land where the taking was, was at the time of the lease parcel of the demesnes of the manor, and were in the possession of the said *J. Fox*; and that the said scite and demesnes had been usually let for twenty years before, and that the rent was the ancient rent; that they were not then in lease, and that the lease was not without impeachment of waste; and that *Agnes* is dead, and the two daughters were the heirs of the body of *Agnes*, in whose right the avowry was. The defendant demanded *oyer* of the indenture, which was entered *ut supra*; and pleads, that the manor was not let for the greater part of twenty years before the lease made; and upon this the plaintiff demurs. The question was, If this were a good lease for the scite and demesnes which had been usually let, and avoidable for the residue (a); or being both joined in one lease, is avoidable in all?—And it was moved, though it be by one indenture, yet the words being several in the demise and the *habendum*, and several reservations, this is not a joint but several lease; and one lease for the scite and the demesnes, and another for the residue of the manor, 14. *Eliz. Dyer*, 308. *Winter's Case*. But admitting it to be a joint lease, yet when one rent is reserved for the scite and demesnes which had been usually letten, and another rent for the manor, so the rents are several and distinct, and so no prejudice to the issue in tail, and no danger of apportionment.—But of the other part it was urged, that this is an entire lease; for when she first lets the scite and demesnes, and after lets the entire manor, it is as if she had let the manor entirely, and the rent reserved as issuing out of the whole manor.—At the end of the term it was moved again: Vide Moor, 97. and all THE JUSTICES resolved there are several reservations; and 4. Leon. 27. so the lease is good for the scite and demesnes; and it seemeth that these several reservations, and the several words in the *habendum*, 5. Co. 55. make it as several leases: but they said it was not much material whether it be several leases, in regard there are several reservations. And it was adjudged for the plaintiff.

(a) See the 32. Hen. 8. c. 28. f. 2.

Cherbourn against Rye.

CASE 8.

DEBT upon a lease for years of a house and land. The defendant pleads, that the lessor had entered upon part of the land let, and that he had pulled down part of the house, and so had suspended his rent. The plaintiff replieth, that the defendant had re-entered into the land, and into that part where the house stood. And hereupon it was offered to demur.—BROMLEY moved, if the rent were not revived by the re-entry into the land where the house stood.—POPHAM and GAWDY conceived the rent is not revived; for when the house was let, it is part of the cause for which the rent was reserved; and when the lessor had taken from him part of the benefit, *scil.* the house, yet his re-entry into the land where the house stood, doth not revive the rent. FENNER and CLENCH doubted. *Et adjournatur*.

Qu. If the re-entry of a lessee upon the entry of a lessor who had pulled down part of the demised premises, revives the rent?

1. Roll. 940. See the case of Hunt v. Cope, Cowper, 242. and the cases there cited.

CASE 9.

Peter Palmer *against* Boyer.

Words impeach-
ing the know-
ledge of a lawyer
in his profession
are actionable.

ACTION FOR WORDS. That he being a counsellor at law, and steward to J. S. of his manors, the defendant said of him, "He is a paltry lawyer, and hath as much law as a jack-an-ape." Upon not guilty pleaded, it was found against him, and damages twenty pounds. And it was moved that the action lieth not; for it is not said, he had "no more law than a jack-an-ape."—But it was adjudged for the plaintiff; for the words are scandalous, and touch him in his profession.

CASE 10.

Baxter *against* Shade.

Words which
impeach the in-
tegrity of an of-
ficer are action-
able.

ACTION FOR WORDS. "Thou art a forsworn jack in the court baron of D. Thou hast sworn me out of twenty shillings rent, and hast me on thy side."—Adjudged that the action lay, and the plaintiff recovered.

Post. 438. J. Hawk. P. C. ch. 69. 53.

CASE 11.

Ball *against* Roane.

Words of dis-
grace and re-
proach shall be
taken in their
worst sense.
Ante, 308.
J. Com. Dig.
397.

ACTION FOR WORDS. "There was never a purse cut within twenty miles of *Wellingborough*, but thou hadst thy part in it." And avers, that such a purse was cut, &c. and he had no part in it.—And it was moved, that an action lieth not; for it is not said he had a part of it as a partaker in the felony; for he may have a part in it in the loss, and so it is no slander.—But it was adjudged for the plaintiff; for the words shall be taken to be spoken in the worst sense, in disgrace and reproach of the plaintiff.—NOTA, *Serjeant Yelverton* cited a case, *Paſch. 32. Eliz. Sir Edward Hastings* brought an action for these words: "You have procured a perjured man to seek my blood;" and ruled, that an action did not lie. But FENNER said the case was not adjudged, but ended by his arbitrament.

CASE 12.

May *against* Middleton.

Trinity Term, 35. Eliz. Roll.

The plea of
*foreign at-
tachement*;
pending the bill,
pleaded to debt
on bond, goes
in bar, and not
in abatement.
Ante, 253.
Id. Raym. 651.
2. Salk. 519.
22. Mod. 543.
Doug. 363.

DEBT upon an obligation of 80l. The defendant pleads, that the plaintiff pending the bill brought against him a plaint in *London*, and there by custom had attached forty pounds of a debt due to the defendant in the hands of J. S. in satisfaction of forty pounds due upon this bond; and demanded judgment of the bill, and prayed it might abate. And to this the plaintiff did demur; for this amounts but to an acceptance of part *pendente billâ*, which goeth in bar, and not in abatement.—And it was argued by GODFREY for the plaintiff, and ALTHAM for the defendant.—And all THE COURT (except POPHAM) conceived that it is a plea in bar, and not in the abatement of the bill; for the plaintiff for this part is to be barred for ever; and this receipt of parcel is a lawful act. But if the defendant enters pending the writ, this shall abate the writ; for his entry may be unlawful.—And FENNER said, it hath been so adjudged in the common pleas. *Vide the Book of Entries, fol. 159.* a precent accordingly.—And they adjudged it so,

so, against the opinion of POPHAM; because the plaintiff by his own act doth falsify his own writ. But it was said a recovery is by act in law, which may help the case; otherwise of a bare acceptance.

MAY
against
MIDDLETON.

Brent against Ingram.

CASE 13.

ACTION FOR WORDS. For that the defendant said to *J. Brent*, son of the plaintiff, in the presence of divers, "Thou (*præfat. J. Brent innuendo*) and thy father (*innuendo* the plaintiff) were both perjured; and I (*innuendo* the defendant) will prove you both perjured." Upon not guilty, it was found for the plaintiff, damages twenty pounds. And it was moved in arrest of judgment, that it was not averred that *J. B.* was the son of the plaintiff.—But it was held well enough, for that it was alledged, that the words were spoken to *J. Brent* his son. And it was adjudged for the plaintiff.

A father may maintain an action for slander-
ing him and his son, without averring that he is his son.
Cro. Jac. 444.
2. Stra. 899.

Lacy against Whetston.

CASE 14.

ASSUMPSIT. And declared, that whereas there were divers controversies between the plaintiff and defendant concerning the right of the office of steward and clerk of the court of pleas in *Peterborough*, and concerning the right of the court of *pypowders* in *Peterborough*, and concerning the office of stewardship and clerk of divers courts of the dean and chapter of *Peterborough*, and concerning an annuity of six pounds thirteen shillings and fourpence granted by the dean and chapter of *Peterborough* to *J. S.*; and that whereas they submitted themselves to the order of *Mr. Heron de præmissis fiend'*; the defendant, in consideration that the plaintiff of his part assumed to stand to the award of *Mr. Heron*, did assume to stand to and perform the award and order of *Mr. Heron de præmissis fiend'*. And alledges in fact, that *Mr. Heron* made an award, that the defendant should have and enjoy the said office of steward and clerk of the pleas, and of the said court of *pypowders*, without interruption of the plaintiff; and that the plaintiff should enjoy the stewardship of the courts of the said dean and chapter of *Peterborough*, and the court of *pypowders*, without interruption of the defendant; and also the said annuity of six pounds thirteen shillings and fourpence; and that the plaintiff should make an assignment of all his right in the said office of steward and clerk of the court of pleas in *Peterborough*, and of the court of *pypowders* there, to the defendant in such manner as he shall advise; and further awarded, for that the defendant had exercised the said office of steward of the courts of the said dean and chapter without the assent of the plaintiff, and for divers other considerations, and for the quieting of all controversies between them, that he should pay to the plaintiff thirty pounds within three months then next ensuing: and for non-payment of the thirty pounds he brought this action. Upon *non assumpsit* pleaded, it was found for the plaintiff, and damages forty pounds.—And it was now moved in arrest of judgment: First, That the arbitration is not made according to the submission; for the submission

On a submission concerning the right to an office, if the arbitrator award that for divers other considerations one party shall enjoy the office, it is sufficient; for it shall not be intended that there were other matters in dispute, and his rigor to the office is implied in the order that shall enjoy it.
Ld. Raym. 664.

LACY
against
WHITTON.

was for the right of the office, &c. and the award is only, that the defendant shall enjoy the office, and speaks not of the right of the office.—*Sed non allocatur*; for the award is, that he shall enjoy the office, which doth imply the right of office; and the award is, that the plaintiff shall make an assurance of the right of the office, which is as much as the submission requireth.—Secondly, it was moved, that the award is, for that the defendant had meddled with the office of, &c. without assent of the plaintiff; and for divers other considerations, and for ending all controversies, that he shall pay thirty pounds, &c. which is void; for that the arbitrator awards this for other considerations, with which he was not to meddle, and for the ending of all controversies which is out of the submission; for he was to meddle only with the controversies concerning the offices, &c. and the submission is to his award *super præmissis*.—*Sed non allocatur*; for other considerations being but general parlance, implies nothing, except express considerations were shewn; for otherwise none shall be intended: but if any had been found which were not within the submission, this would make the award void for that part; so in that it is awarded for the ceasing of all controversies between them, &c. it shall not be intended there were any except concerning the offices, if none be shewn in the award or by averment; and this being so in a general intendment, is good. And it was adjudged for the plaintiff.

Post. 661. 353.
361.

CASE 15.

Walter Dennis against Wells.

Michaelmas Term, 34. & 35. Eliz. Roll 147.

If part of a debt
be levied on a
fi. fa. and the
plaintiff after-
wards sues a ca.
fa. to outlawry
for the whole
deb, the out-
lawry shall be
reversed.

3. Roll. Ab. 904.

ERROR of a judgment and execution sued in the common pleas. Error assigned was, For that the said *Wells* recovered against the said *Dennis* a debt of four hundred marks, and had execution by *fi. fa.*; and upon it the sheriff returned, that he had levied ninety pounds, parcel of the debt, and had the money in court; and that *Dennis* the defendant had no more goods; unde, &c. and notwithstanding *Wells* sued a *capias ad satisfac.* of the whole four hundred marks, and an *exigent* upon it. Upon which *Dennis* was outlawed; and to reverse this outlawry and execution, he brought a writ of error.—And for this cause it was held clearly by THE COURT, that the execution and outlawry were erroneous; for it ought to have made mention of the ninety pounds which was levied before: and the outlawry and execution were reversed; but no error being assigned or found in the judgment, that was affirmed. 44. *Edw* 3. 12. 4. *Hen* 7.

CASE 16.

Callard against Callard.

A father, being
seised in fee, in
consideration of
his son's mar-
riage says, upon
the land. "Eu-
stace, stand
forth; I do
here reserve
an estate
for my own and my wife's life, give thee these my lands and
BARTON, to thee and thy heirs." —Adjudged (on
a writ of error) not to be a good feoffment; for that an use cannot arise by parol. Ante, 279.

EJECTIONE FIRMÆ. The case upon special verdict was, That *Thomas Callard* being seised in fee of certain land, in consideration of a marriage of *Eustace* his eldest son, said these words (being upon the land): "*Eustace*, stand forth; I do here, reserving an estate for my own and my wife's life, give thee these my lands and BARTON, to thee and thy heirs." The question was, If this was a good feoffment to *Eustace*?—COKE, Attorney General, for the plaintiff. There are two points to be considered: First, If this shall inure as a

feoffment

feoffment to the use of *Thomas Callard* and his wife for their lives, and after to the use of *Eustace* and his heirs; or if it be an immediate feoffment, and the reservation void? Secondly, If it be not a feoffment, if the words spoken, being in consideration of marriage, the use shall arise out of the possession of *Thomas*, and shall execute by the statute of uses, although it be without deed?—

FIRST, It seemeth that it is a good feoffment, and the use shall arise upon it, although the words *reservant* are first; for so the Court is to consider it, to make all to stand together; and in 22. *Eliz.* between *Hare and Barton*, it was adjudged, that where one giveth lands to *J. S.* reserving a rent to the feoffor and his heirs, *habendum* to the feoffee and his heirs; the reservation being before the *habendum*, yet the feoffment being by indenture, it is well enough; for the law shall marshal it according to the intent. So here it shall be intended as following, and to shew the intent of the parties, and not to make it all void.—SECONDLY, Admitting that the reservation is repugnant, and it can be no feoffment, yet the use shall arise and execute by *parole*; for it is out of the statute of enrollments; for this doth not hinder the raising of any uses, but only upon bargains and sales, which shall not execute by bargain and sale, but by indenture enrolled; but all other uses are at the common law, which arise upon consideration upon marriage, &c. But he did agree that an use shall not arise upon general words, or words spoken *in futuro*, but *in presenti*; as to say, "If you do such a thing, I will give you my land." But upon words spoken advisedly, and by reason of a valuable and great consideration, and spoken *in presenti*, as, "I do here, &c." which is an immediate gift. And he had seen the record of the case 12. *Eliz. Dyer*, 296. and the words were upon communication of a marriage to be had; "I will assure after my death *Old-Acre* to my son," it was ruled no use ariseth: and the reason seemeth to be, that the words were spoken *in futuro*; and therefore if one faith to his son, in consideration he is his son, "I do give thee my manor of *D.*" this is sufficient to raise an use; for they being words spoken with advisement, and for consideration, it shall be intended a gift of the land.—GAWDY. I have not seen any book, that at the common law a use shall arise by *parole*, but in a bargain and sale which is by reason of the consideration given for the land, and that is the reason that a fee doth pass without the word *heirs*; and in this case an use shall not arise; for it appeareth his intent was to pass the land by way of feoffment, when he faith, "Stand forth, I do here give thee this land, &c." which is void by way of feoffment, for the reservation preceding it is repugnant to the livery, for it cannot inure *in futuro*.—FENNER. The reservation is void, and it shall inure to *Eustace* presently; and an use by *parole* upon good consideration is sufficient.—CLENCH. It shall inure as a feoffment to the son, and an use shall arise to the father, &c. and so the intent of all the parties shall be observed.

At another day it was moved again: and POPHAM said, (a) See 3. C. they were all resolved that judgment shall be given for the plaintiff (who claimed under *Eustace*); and being moved to shew the reasons of their judgment, they would not (a).—But GAWDY said, he was clear of opinion that an use shall not arise by *parole*.—POPHAM and FENNER said, they were clear of

CALLARD
against
CALLARD.

Plowd. 303.
2. Roll. Abr.
7. 782.
Hob. 170.
Moor, 544.
Co. Lit. 48.
2. Com. Dig. 589.
2. Bac. Abr. 437.
1. Wood's Con.
502.
Gilb. Uses, 65.
114.
Doug. 26.

Popham, 47.
where the rea-
sons for this
opinion are
given.

CALLARD
against
CALLARD.

a contrary opinion; and POPHAM said, that 7. *Edw.* 6. it was adjudged, that an use may rise by parole, and he could shew the record of it. FENNER said it was a good feoffment, but would say no more. And it was adjudged for the plaintiff (a).

(a) Sed vide S. C. Moore, 687. 2. An- Hob. 170. Co. Lit. 48. 2. Com. Dig. 569.
derfon, 64. where it appears that the judg- 2. Bac. Abr. 487.—By 29. Car. 2. c. 3.
ment was reversed on a writ of error to the all estates created by livery and seisin only,
exchequer chamber. See also 2. Roll. not put in writing and signed by the parties,
Abr. 788. 1. Vent. 140. 1. Sid. 26. 82. shall be estates at will.

CASE 17.

Bold against Bacon.

Qu. If an action
for slandering
another's title
will lie if the
words are ob-
lique and argu-
mentative, and
may by possibi-
lity be true?
Ante, 197.
Post 427.

Cro. Jac. 163.
384. 484.
2. Leon. 112.
3. Leon. 177.
Ray. 4.
1. Sid. 26.
1. Co. 77.
4. Co. 18.
Allen, 3.
1. Roll. Rep.
244. 407.
Moore, 410. 187.
Dalif. 103.
Yelv. 80. 88.
Cro. Car. 140.
4. Burr. 2422.

ACTION for slandering his title. And declared, that whereas *William Bacon*, brother of the defendant, had married one *Isabel*, and died, and afterwards the plaintiff married her; and whereas the plaintiff and the said *Isabel*, as in her right, were seised of divers lands as well freehold as copyhold in fee; and had made a surrender of the copyhold to the plaintiff and his heirs; and of the freehold had levied a fine to the use of the plaintiff and his heirs; and that whereas the plaintiff intended, and had offered to sell the said land for payment of his debts, &c. and had offered them to *J. Cleyburne* in sale; the defendant, well knowing the same, and envying the estate of the plaintiff, and to slander his title to the premises, said these words: "She," *innuendo* the wife of the plaintiff, "was never the lawful wife of my brother *William Bacon*, for she was married before to one *Nicholas Killingtree*, who is yet alive; which marriage is fully to be proved, and hath been already as fully proved as any other marriage can be proved:" and that by reason of these words none would buy the land, &c. to his damage of 300 pounds. Upon not guilty pleaded, it was found for the plaintiff, to his damage twenty pounds.—And it was now moved in arrest of judgment, that upon the matter the action lieth not; for that which is alledged is no slander; for it may be that *Killingtree* was married to her *infra annos nobiles*, and they afterwards disagreed, or that a divorce was had between them for this cause; and then although *Killingtree* be alive, yet it might be a lawful marriage with *William Bacon*, and by consequence with the plaintiff; and so is no direct slander.—GAWDY and CLENCH conceived the action lieth; for the action is brought for slandering his title, and not his person; and the law intends it was a good marriage with *Killingtree*; and no divorce was, except the contrary be shewn; and those that heard the words knew not if a divorce was.—FENNER *contra*. This action lieth not but by reason of the prejudice in the sale; and this appeareth not, for upon a surrender or fine by a *feme covert*, she is examined; and it is good till the *baron* doth defeat it, which appeareth not here; and an action doth not lie for slander but when it is express, and not by argument; and here it is by way of argument, for that *Killingtree* was married to her and is alive, and so may be collected that she is not the lawful wife of the plaintiff; and the surrender and fine not good.—POPHAM agreed. First, Because it was said it was by way of argument, and all the words may be true, and yet she may be the lawful wife of the plaintiff; for it may be she was re-contracted to the plaintiff, and afterwards married to *Killingtree*, and then to *Bacon*, and he died;

and then divorced from *Killingtree*, and married to the plaintiff; and so there may be an evasion of the conclusion. Secondly, Here is no direct speech, but *oblique*; and an action lieth not but for words *directly spoken*; and cited *Anne Davis' Case*, 4. Co. f. 17. So if *J. S.* hath land by descent, and sells it to *J. D.* and he offers to sell it to *B.* and one saith to *C.* (in common discourse) that *J. S.* is a bastard, and this cometh to the ears of *B.* yet *J. D.* shall have no action, for it was not spoken directly to slander the title of *J. D.* but *oblique* this is no slander: but if he had said to *B.* "Take heed how you buy the land, for *J. S.* was a bastard," action lieth; for it was directly spoken to that purpose, to slander the title.—*Et adjournatur.*

BOLD
against
BACON.

Buckhurst against Newton.

CASE 18.

PROHIBITION for suing for tithes of faggots of oak and elm, *cautelè* making his libel for faggots which were of beech and thorn. The defendant prayed a consultation, *ita quòd* he should not meddle with the faggots of oak and elm, for otherwise the party that maketh the faggots may *per cautelam* put in a stick of great wood into the faggots, and so prejudice the parson of all the tithes of the residue.—But THE COURT said, if it be so, the party must shew the special matter *pro consultatione habendâ*, that the oak and elm are so intermixt, that he cannot do otherwise; and pray a consultation as to that which was thorn and beech. And so it was done in *Molyns' and Dawes' Case*, where such a special consultation was granted upon such special plea: but as it is, he can have no consultation for any part.

Tithes are not payable for faggots of beech and thorn intermixt with the lop-pings of oak and elm.

Yelv. 119.
2. Leon. 79.
1. Roll. Ab. 637.
Mar. 58. 64.
2. Inst. 621.

Pannel against Fenn.

CASE 19.

Michaelmas Term, 35. & 36. Eliz. Roll 26. or Hilary Term 36. Eliz. Roll 56.

TRESPASS. Upon special verdict the case was, *John Fenn* was possessed of a lease for years; and having issue *John* and *George* his sons, and *Margaret* his daughter, maketh *George* and *Margaret* his executors; and deviseth his term to his executors until such time as all his debts and legacies be paid, and that they shall have levied all charges they shall be put unto by any suit touching his will, or by any other means in the due execution of his will. The residue of his term then unexpired, he devised to *John* his son, and the heirs of his body; and afterwards to *George* and his heirs; and dieth. The executors enter generally into the lands, and *Margaret* sells the term to the plaintiff; and afterwards *George* sells it to the defendant; and *John* dieth without issue: and they further find that the debts are not paid. The question was, If *George* and *Margaret* take this term as a legacy, or as executors? and secondly, If the general entry be an execution of the legacy?—As to the first, THE JUSTICES resolved, if they take it as a legacy, then the plaintiff and defendant are tenants in common, and then an action of trespass doth not lie; for although the defendant, who had the estate of *George*, doth not plead the tenancy in common, but pleads not guilty; yet this appearing to the Court by the verdict, the action lieth not: but they all resolved they do not take as a legacy, but as executors; for no more is given to them by the will, than the law giveth to them as executors; then the devise is void, and they take as executors; for it being given to them until debts

A. makes *B.* and *C.* his executors, and deviseth to them a term of years until all debts, legacies, and charges are paid. Each of them have an entire authority; and either of them may grant the term to a stranger.

1. Roll. Abr. 618. 924.
Moor, 350.
Gould. 185.
Dyer, 23.
21. Hen. 7. pl. 25.
28. Hen. 6. pl. 3.
Godol. 134.
2. Peere Will. 532.

PANNEL
against
FENN.

Ant. 223.
Co. 10. 47.
Post. 387. 816.

and legacies be paid, this the law willeth; and when it is given to them until they be satisfied of the charges they are put unto by the will; this is no more than the law giveth, for by law they are to be satisfied of all such charges, if the charges do not arise by their own default. But admitting the devise be good, yet their general entry doth not execute the term in them as a legacy; for when a particular interest is given, and the residue to another, this entry shall not be an election to take it as a legacy, except there be an expresse declaration of their intent; for otherwise they shall be charged for the residue as a *devastavit*, which the law will not enforce; but if the entire term be given to the executors, it shall be otherwise, for there is no mischief. And it was adjudged for the plaintiff. *Dyer. 277. b. Post. 386.*

CASE 20.

"I think he is a
horse-stealer"
are actionable
words.

Stich against Wisedome.

ACTION for these words: "Many an honest man has been hanged; and a robbery hath been committed, and I think he was at it; and I think he is a horse-stealer." It was moved after verdict, that an action lieth not without an expresse averment he was so.—*CURIA contra.* They are a great slander, if the defendant sheweth not a good cause of his thinking. And it was adjudged for the plaintiff.

CASE 21.

If words are too
general, no
action lies.
Mo. 428.

Nichols against Badger.

ACTION for these words: "Thy credit hath been called in question, and a jury being to pass upon it, thou foistedst in a jury early in the morning; and the lands thou hast are gotten by lewd practices."—It was adjudged that no action lay, for the words are too general.

CASE 22.

"Thou art for-
sworn" is slan-
derous, altho'
the oath is not
alleged.

Ante. 297. 342.

1. Hawk. P. C. ch. 69. f. 3.

Banks against Stacy.

ACTION for these words: "Thou art a forsworn jack in the court of A. Thou didst swear away twenty shillings from B." and avers that the court of A. was a court-baron.—And the plaintiff had judgment, although it was not shewn between what persons or in what action he was sworn.

CASE 23.

Covenant that
"he his execu-
tors and af-
signs" would
repair. An
assignment of
the breach must
allege that nei-
ther he nor his
executors nor
his assigns did
repair.

1. Mod. 42. 67.
223.

1. Vent. 114.

5. Mod. 133.

Salk. 159.

Colt against How.

Trinity Term, 36. Eliz. Roll 897.

COVENANT. For that the defendant by indenture did covenant, that he and his executors, and assignees would repair a mill, let to the defendant; and alledgeth, that the mill was defective in reparations, and the defendant his executors and assignees did not repair it. And it was demurred upon the declaration, because he did not alledge that he *nor* his executors or assignees did not repair it; for if any of them did repair it, the action doth not lie; and it ought to be alledged in the disjunctive, not in the conjunctive.—And of that opinion was **THE COURT**, that the breach was not well assigned; and though this fault was not assigned by the demurrer, yet he shall take advantage of it. But upon the motion of the Court, the defendant waived his demurrer, and the plaintiff amended his plea, and the defendant pleaded to issue.

1. Strange, 195. 524. 1. D. Raym. 1898. 366. 8. Mod. 238. 1. Wood's Con. 428.

Weeks

Weeks' Case.

CASE 24.

ACTION for these words: "*Weeks* assaulted me and others, to have robbed us; but we were too strong for them, and escaped."—Adjudged actionable, for if one saith that *J. S.* lay in wait to do a robbery or murder, an action lieth, though no felony was done.

Words actionable.
Moor, 409.
Ante, 6.

Berry against Greene.

CASE 25.

TRESPASS. Upon special verdict the case was, A copyholder surrenders to the use of *J. S.*; the lord without reasonable cause refuseth to admit him. The question was, If he might enter without admittance?—And **THE COURT** held clearly he could not enter, unless there be a special custom to warrant it; for after the surrender and before admittance, he who maketh the surrender continueth in possession, and not the lord or *cestuy que use*, and he shall have trespass against any that enters; as if a copyholder surrenders to the use of his will, yet it is clear he shall have it during his life: so in the principal case, *cestuy que use* shall not enter nor have action before admittance.

The surrenderer of a copyhold cannot enter or support an action before admittance, though the lord refuse admittance without cause.

1. Roll. 264. Co. Lit. 62. a. Cro. Car. 283. Cro. Jac. 403. 3. Bulst. 218. 238. 1. Vent. 261. 2. Wilk. 14. 162. 1. Burr. 206. Gilb. Ten. 290. 1. Term Rep. 261. 2. Term Rep. 198.

Yelv. 144.
1. Bulst. 206.
1. Ro. Ab. 502.
3. Lev. 185.
Term Rep. 198.

Atterton against Harward.

CASE 26.

ACTION upon the case. And declareth, that a *capias ad satisfaciendum* upon a judgment was awarded against the defendant to the sheriff of *Suffolk*, who directed his warrant to the plaintiff as his bailiff to serve it, and that the plaintiff assumed to the sheriff to save him harmless against all escapes; and that by force of the warrant he arrested the defendant, and the defendant, intending to make the plaintiff to be charged, escaped, for which the plaintiff in the first action brought an action against *J. Colt*, then sheriff, upon this escape, and recovered; and *Colt* brought an action against the now plaintiff upon his *assumpsit*: and for this tort he brought his action. Upon not guilty pleaded, it was found against him. And it was moved in arrest of judgment, that there is no sufficient cause in the declaration to maintain an action; for although the sheriff may have an action of the case against the prisoner who escapes, as it was adjudged in *Hill and Holt's* case, yet the bailiff shall not have it.—And of that opinion was **THE COURT**, for the bailiff was not chargeable to the sheriff by law, but by his *assumpsit*; and this being his voluntary act, shall be no cause to charge the defendant, but shall only make himself chargeable. But they agreed, if the bailiff had been chargeable by law, without such promise, an action did lie for him against the defendant, who caused him to be charged.

A bailiff cannot maintain an action against a defendant for an escape in consideration of his having promised to save the sheriff harmless against it.
Ante, 53.
Cowp. 403.
Dough. 40.
1. Term Rep. 418.

Watkinson against Man.

CASE 27.

UPON special verdict the question was, If a lease made by a prebend is good by the 23. Hen. 8. c. 28. for he is not seized *in jure ecclesiæ sed præbend.*?—And it was adjudged good, for a prebend is not excepted, but only parsons and vicars, and being not excepted, he is as bishops. **POPHAM** said, in *Dr. Dale's Case*, for a house *juxta Paul's*, is was so adjudged, and so had been twice adjudged in his experience. And **FENNER** said, it was so adjudged in the case of a treasurer of a church.

A prebend is within the enabling statute of 32. Hen. 8. c. 28.
Co. Lit. 44. b.
4. Leon. 51.
1. Lev. 112.
3. Bac. Ab. 335.
1. Wood. Con.

Michaelmas 189.

Michaelmas Term,

36. and 37. Eliz. In the Common Pleas.

Sir Edmund Anderson, *Knt. Chief Justice.*Francis Beaumont, *Esq.*Thomas Walmsley, *Esq.*Thomas Oweri, *Esq.*} *Justices.*Sir Edward Coke, *Knt. Attorney General.*Sir T. Fleming, *Knt. Solicitor General.*

CASE I.

James Apharry against Roger Bodingham and the
Petit Jury.

In an action
against an heir,
the averment of
"assets by dis-
cent" shall not
be defeated by a
conveyance
made by the
ancestor "to
the use of
himself for
life, remain-
der to his first
son and every
other son in
tail, remain-
der to himself
in fee, with
power to
make leases,
and revoke
uses," pro-
vided the jury
find it to be
fraudulent.
Ante, 326.
Post, 355.

5. Co. 36.
10. Co. 80.
2. Com. Dig.
578.
Cowp. 474.
705.

(a) *Quere*, if
copyholds are
within this sta-
tute?
Cowp. 705.

ATTAINT on the 23. Hen. 8. c. 3. For that the *petit jury* at the assizes at *Heriford* gave a verdict for *Bodingham*; and assigned the *faux serement* in this: That whereas *R. Bodingham* brought debt against *J. Apharry* as heir to *G.* his father, he pleaded "*riens per discent, unde debitum prædict. solvere potuit, &c.*" to which the said *R. Bodingham* replied, that he had by discent, viz. at *Sus.* in the same county; and issue was taken upon it. Evidence was given that certain lands in *S.* did descend to him as son and heir to his father; but he shewed a deed indented made in 27. *Eliz.* between himself of the one part, and *Walwin* and others of the other part, by which he covenanted for natural affection, &c. to stand seised of the land to the use of himself for life, remainder to his first son in tail; and so to his other sons, the remainder in fee to himself, in which there was a clause to give power to make leases, and to revoke the uses; and the *petit jury*, notwithstanding this conveyance, conceiving it to be fraudulent, and so void by the 13. *Eliz.* c. 2. did find that he had assets;

NOTA. The action brought by *Bodingham* was 33. *Eliz.* long time after the conveyance made by *Apharry*; but it was proved that the plaintiff *Apharry* had notice of the obligation before the making of the conveyance.

GLANVILLE for the defendant. Notwithstanding this conveyance, the remainder that is limited to his right heirs is his ancient reversion; and this he had by discent; and the issue being, that he had *riens per discent*, and he having this reversion by discent, the issue is found against him, though the conveyance had been *bona fide*.

But to that it was answered, that the issue was, that he had nothing by discent, *unde debitum prædict. levare potest*; and although he had this reversion by discent, yet it being a reversion upon an estate in tail, it is not extendible for this debt.—*Quod fuit concessum PER CURIAM, absente ANDERSON.*

It was then moved by the counsel of the plaintiff, that this is no fraudulent conveyance within the 13. *Eliz.* c. 5. (for it is clear that the 27. *Eliz.* c. 4. (a) doth not touch it). for a conveyance by the 13. *Eliz.* c. 5. must be made by the debtor, and not his heir or any other; for the heir is not a debtor in respect of his person, but in respect of the land.

WALMSLEY. It seemeth that it is within the statute, for the heir is a debtor; which is proved by the writ against him, which is in the *debet et detinet*, whereas an action against the executors is in the

the *detinet* only, and so it is within the intent of the statute: but the grand jury may find it specially, if they will.—To this OWEN and BEAUMOND did consent, that the conveyance of the heir shall be fraudulent as a conveyance by the father, who is the principal debtor; and so they conceived it clearly.—But the grand jury gave a general verdict, and affirmed the first verdict.

NOTA. When the grand jury was sworn, the Justices demanded of the crier what manner of oath he gave to them, for the oath ought to be special: but SCOTT the *prothonotary* said, it ought to be general to try the issue in the attain; to which the other clerks agreed.

APHARRY
against
BODINGHAM.

Oath in attain.

Anonymous.

QUARE IMPEDIT. It was resolved, if there be two parsons of one church, and each of them hath the entire cure of the parish, and both the benefices of the value of eight pounds *per annum*, one of them dieth, and the other is presented, this is a plurality within the 21. Hen. 8. c. 13. and is within the intent of the statute, that none shall have two livings or benefices with cure.

Case 2.
If two parsons of one church have each an entire cure, and one is presented to both cures, it is a plurality.

Jackman against Hoddesdon.

TRESPASS. Upon not guilty pleaded, the jury being at the bar, the question was upon the forfeiture of a copyhold in *Layton Buffard*, by reason of a lease for years made by a copyholder. And it was held *PER CURIAM*, that a lease for years of copyhold land by indenture or parol is a forfeiture, unless there be an express custom to warrant it.—And thereupon it was shewn on the part of the copyholder, that there were leases made by indenture, 27. Hen. 8. and divers times since, some twenty, and some forty years since, of copyhold land of that manor. But THE COURT held that was not sufficient, for they are of too late time to prove a prescription, which ought to be from time whereof, &c.

Case 3.
A lease for years made by a copyholder unwarranted by the custom; or a refusal to pay the lord a reasonable fine; are forfeitures of the estate.
Post. 499. 779.
1. Roll. Abr. 507.
Co. Lit. 59. b.
Gilb. Ten. 234.
Doug. 725.

And THE COURT held, that a wilful refusal to pay a fine is a forfeiture, if the fine demanded by the lord be reasonable, where the fine is arbitrable at his will, and the jury is to try whether it be reasonable or not. And the custom of the manor was here shewn to be, that the lord was to seize the land till fine was made with him for it; which was held a reasonable custom.

And upon evidence it was held, that if a tenant be amerced, and dieth before the lord hath levied it, that it is lost, for it is *quasi actio personalis*.

Vaughan against Comitem Bedford, the Bishop of London, and Gainsford.

Case 4.

QUARE IMPEDIT, for the church of *Littleton*.—It was held *PER CURIAM* upon evidence, that a corporation may be known by two names; and if it hath been so known from time, &c. a grant made by either of the names is good.

A corporation may be known by two names.
1. Lutw. 519.

Lyne against Backhouse.

Case 5.

ACTION for these words: "He hath beaten me and taken away my purse, and twenty shillings in money."—It was held *PER CURIAM*, that the words are not actionable (*absente ANDERSON*), for it may be intended he took it as a trespassor, for he chargeth him not with felony.

Words importing a trespass only are not actionable.

Underhill

CASE 6.

Underhill against Jo. Brooke and Margaret his Wife.

Divorce may be pleaded to an action against husband and wife, and it shall be supposed to have continuance.

1. Term Rep. 3. 10.

(a) Lut. 24.

Barnes, 224.

334.

DEBT against them as executrix of the former husband upon an obligation of two hundred pounds. The defendants by J. G. their attorney plead, viz. "*prædict. Johannes et Margareta* by their attorney plead, that they were divorced before the writ purchased." It was thereupon demurred in law: First, Because it was not alledged that the divorce did continue, for it may be it is repealed.—*Sed non allocatur*: For it shall be intended to continue, if the contrary be not shewn.

Secondly, Because they plead as *baron* and *feme*, "*et prædict. Johannes et Margareta*," and that after imparlance (a).—*Sed non allocatur*, for they do not plead *et prædict. Johannes et Margareta uxor ejus*; for then it should be an estoppel; but they plead according to good form: and it was adjudged that the writ should abate.

CASE 7.

Deux against Jefferies.

If a man covenants, "that he will never sue," it is a release; but "that the obligor shall not be sued before such a feast," is a covenant.

Co. Lit. 246.

9. Co. 52. b.

1. Roll. Abr.

939.

Show. 47. 321.

4. Bac. Abr.

101, 266.

1. Lord Raym. 430. 2. Salk. 575.

DEBT upon an obligation. The defendant pleads, that the plaintiff by indenture, &c. did covenant that he would not sue the bond before Michaelmas, and thereupon demanded judgment, *si actio*, &c. intending, that the action being suspended for that time, was gone for ever. It was thereupon demurred, and argued by FLEMING for the plaintiff, and by DREW for the defendant, and 21. Hen. 7. 24. 4. Hen. 7. 6. were cited.—But THE COURT without further argument resolved for the plaintiff, for it is only a covenant, and shall not inure as a release; and it is not to be pleaded in bar, but the party is put to his writ of covenant, if he sued before the time. But if it had been a covenant that he would not sue it at all, there peradventure it might inure as a release, and to be pleaded in bar, but not here; for it never was the intent of the parties to make it a release. And it was adjudged for the plaintiff.

CASE 8.

Pipes' Case.

Assumpsit in consideration of having become bail, must alledge before whom bail was taken.

ASSUMPSIT. And declareth, that whereas the defendant was arrested for surety of the peace, in consideration the plaintiff would be bail for him, he did assume, &c. and alledgeth *in facto*, that he became bail for him, but saith not before whom.—And this matter after verdict being alledged in arrest of judgment, it was held to be good cause of staying it, by WALMSLEY and BEAUMOND; for the consideration ought to be precisely alledged to be performed; and therefore he ought expressly to have alledged before whom he entered into bail, that it might appear he had authority to take bail. *Sed adjournatur*.

CASE 9.

Samms against Foster.

Where the cause of justification is local, the defendant must traverse every other place, as well as that laid in the declaration.

Co. 8. 124.

Post. 403.

1. Saund. 312.

Ant. 130.

ACTION of trover and conversion of an ox-hide of the plaintiff's in Middlesex. The defendant pleaded, that the city of London is an ancient city, and that there is a custom there, that *si aliquis extraneus forinsecus à libertate ejusdem civitatis* buy any thing, *alio forinsecus à libertate prædict.* that it should be forfeited to the mayor and commonalty of the said city; and saith, that the plaintiff *extraneus à libertate* did buy the said ox-hide of another foreigner, whereupon he seized it in London to the use of the mayor, &c. ABSQUE HOC that he did find it, and convert in Middlesex. And

And it was thereupon demurred.—GLANVILLE argued for the plaintiff: First, That it was not a good or lawful custom (a); and in proof thereof cited the case 36. Hen. 6. of jewels of the king's fold; and 21. Hen. 7. pl. 40. 3. Eliz. Dy. 186. and 246. And the form of the pleading he said is not good, viz. *si aliquis extraneus à libertate*; but doth not shew where the liberty is: and the traverse is not good; for he ought to traverse every county besides London, and not *Middlesex* only.—ANDERSON and BEAUMOND conceived the form of the pleading to be ill; but for the matter of the custom itself they doubted.—OWEN said the custom was good (b), and had been allowed before these times. *Et adjournatur*.

SAMMS
against
FOSTER.

Doct. Pla. 361.
367.

Cro. Car. 45.

372.

Noy. 57.

Cowp. 175.

(a) This custom is explained and confirmed by charter. 20. Hen. 7. Vide Priv.

London. 19. 104.

(b) Co. Lit. 282. b.

Taverner against Dominum Cromwell.

CASE 10.

TRESPASS. The case upon demurrer was, Divers copyholds were granted by one copy, and several *habendums* and several *reddendums* for every of them; but they all began at one time, and were to end at one time. The copyholder committed waste in one of the copyholds. The question was, Whether that should be a forfeiture of them all?—Secondly, For this copyhold wherein the waste was done, which was cutting down trees, the copyholder prescribes, "that every copyholder of that parcel of wood hath used to cut down trees there growing." The question was, If such a prescription for one copyholder only was good?—Thirdly, Whether the not coming to the court upon summons at the church be cause of seizure?

If several copyholds are held by several tenures, waste in one of them is a forfeiture of that estate only, tho' they were all granted by the same copy.

1. Roll. Ab. 507.

4. Co. 27. a.

3. Leon. 109.

Gilb. Ten. 246,

247.

Ld. Raym. 1000.

FOR THE FIRST, all THE JUSTICES resolved that they are several grants, and as several copies, and the forfeiture of the one is not the forfeiture of the other; and the several *habendums* and *reddendums* make them several in themselves, although they be all by one copy. *Vide 4. Co. 27. a.*

A prescription for one copyholder is good. Post. 390.

4. Co. 31. b.

FOR THE SECOND, they held the prescription good. For WALMSLEY said, there is a difference between a prescription for freehold land and for customary land; for custom which concerneth freehold ought to be throughout the county, and cannot be in a particular place, 45. *Affise*. But a prescription concerning copyhold land is good in a particular; for *de minimis non curat lex*; and the law is not altered thereby; and it may be there is but one copyholder there, for which he might prescribe.—BEAUMOND agreed to this difference, and custom to have a profit *a prender*, *privilege*, or *discharge*, may very well be in a particular. And by OWEN it was ruled accordingly in *Collis's Case* in the queen's bench.

It is no cause of forfeiture for a copyholder to disobey a general summons of the court in the church. Post. 506.

Co. Ent. 283.

1. Roll. Ab. 507

1. Leon. 104.

Cro. Car. 217.

Gilb. Ten. 230.

FOR THE THIRD, they conceived it to be no cause of forfeiture; for it shall not be a forfeiture but upon refusal to perform his services, or a wilful non-payment of the rent, or wilful absence from court: but in this case it may be he had no notice of the summons, and knew not of the court; for the summons properly is to be to his person, or at his house; or it ought to be averred, he had notice thereof.

And exception was taken to the summons, because it was but four days before the court; whereas it ought to be fourteen days at the least.—And of that opinion was WALMSLEY. But the other JUSTICES were against him therein; for they said the summons was well enough for the time. And it was adjudged for Taverner the copyholder. *Vide Coke's Entries*, 272. & 288.

CRO. ELIZ. PART 1.

A a

Bhch

CASE 12.

Bach against Onesly.

Easter Term, 33. Eliz. Roll 409.

If the conusee of a reversion upon a lease for years enter and oust the lessee before attornment, and then make a feoffment of the land, after which the lessee re-enters; the feoffee cannot maintain an avowry for rent in arrear after the feoffment and re-entry.

Ante, 264.
Post. 332.

Co. Lit. 319.

3. Co. 113.

6. Co. 68.

Owen, 23.

2. And. 15.

1. Stra. 109. 112.

Cowp. 702.

Dougl. 23. 279.

REPLEVIN. The case upon demurrer was, That one *Roger Cooper* made a lease for years to the plaintiff, and afterwards levied a fine of the reversion to *Noke*, who before attornment entered and ousted the lessee, and enfeoffed the avowant; the plaintiff re-enters, and for rent arrear after the feoffment, and re-entry, the defendant avoweth: and the question was, If the avowry were maintainable?—And after divers arguments at the bar, it was resolved this Term by *WALMSLEY*, *BEAUMOND*, and *OWEN*, that the avowry was not maintainable for want of attornment; for as the conusee himself could not avow without attornment, no more shall he that claims in the *per* from him as his heir or assignee; for as the folly of the conusee (who might have had a *quid juris clamat*, and compel the tenant to attorn) shall prejudice himself, so it shall his feoffee: but the lord of a villein, or he who cometh in by escheat, shall avow without attornment; for they come in in the *post*, and no folly can be intended in them.—And *WALMSLEY* said, the reason that an attornment shall be upon a fine is, because the tenant is not to take conusance of every fine, until it be notified to him, by bringing a *quid juris clamat*, or a *per quæ servitia*; and therefore it is not reason that he by his re-entry shall be compelled to take conusance of the fine, and enforce him to attorn, who otherwise was not by law compellable; for the law will not compel him to take notice of a feoffment by the conusee, who is *quasi* a stranger to him: but there is so great privity between the lessor and lessee, that he ought at his peril to take notice of acts done by the lessor upon the land, whereof by intendment he cannot be ignorant; but of acts done by a stranger, the law enforceth him not to take knowledge. And the case of *Littleton*, that a re-entry shall be an attornment, is *quasi* a maxim and reason of law; for otherwise it is very hard, and shall not therefore be construed so largely, as to extend to the feoffment of another; for it may be the lessee was beyond the sea, or in prison, at the time of the feoffment, and therefore no equity is given to this maxim, wherein is no exception: and therefore they held that the avowry was not good, for want of attornment. But they in their arguments did conceive, that if in this case the conusee had devised the reversion and died, or had died without heir, so as the reversion had escheated, that the devisee or lord might have avowed without attornment.—And it was adjudged for the plaintiff, 5. Co. 113.—**NOTE.** *Thwayte's Case* in the court of wards was cited to be ruled by the advice of the Justices, that where a reversion was granted, and before attornment, the grantor made a lease for years, that attornment afterwards cometh too late.

By 4. & 5. Ann. c. 16. it is enacted,
“ that all grants and conveyances of any
“ manors or rents, or of the reversion or
“ remainder of any messuages or lands, shall
“ be good without attornment of the te-
“ nants; provided that no such tenant shall
“ be damaged by payment of rent to any
“ such grantor or conuor; or by breach of

“ any condition for non-payment of rent
“ before notice given him of such grant by
“ the conusee or grantee. And by 11. Geo. 3.
“ c. 19. attornments of tenants to strangers
“ claiming title to the estate of their land-
“ lord shall be null and void.” But this
does not extend to attornment made to
mortgages after the mortgage is forfeited, &c.

Pethouse

Pethouse against Crane et Alios.

CASE 12.

TRESPASS. The case upon demurrer was, Tenant for life remainder in tail, remainder to the right heirs of the tenant for life; the tenant for life acknowledged a statute, and dieth; the tenant in tail dieth without issue: the question was, If the right heir of the tenant for life be bound by this statute, and the land liable in his hand (a)?—And all THE JUSTICES conceived, that the land is liable, for the right heir hath it by descent; as the case 5. *Edw. 4. pl. 2.* where such a tenant for life granted a rent-charge: and if the tenant for life had granted the remainder over, as he might, the grantee should have held it charged. *Sed adjournatur*, and was not adjudged this term.

A statute acknowledged by tenant for life shall bind his heir on the descent of the land, by the death of the remainder-man in tail without issue.

Ante, 350.

1. Co. 104. 2.

and the cases there cited.

(a) See 3. & 4. Will. and Mary, c. 14.

Freefton against Standford et Alios.

CASE 13.

TRESPASS. The defendant pleadeth, that the place where is called *White-Acre, &c.* and that it is his freehold. The plaintiff replieth, that the place where is called *Black Acre, alius quàm in barrâ.* The defendant rejoineeth, that the *Acre* mentioned in the bar, and the *Acre* mentioned in the replication, are one, and not divers. And it was thereupon demurred.—And adjudged without argument to be no plea; for it is repugnant to say they are both one, when the plaintiff by his replication hath affirmed upon record that it is another; for when he saith *alius*, it cannot be *idem*: and so are 14. *Hen. 8. pl. 4.* 27. *Hen. 8. pl. 7.* And WALMSLEY said, it was so adjudged 28. *Eliz.* Wherefore it was adjudged for the plaintiff.

Repugnancy in pleading.

See Post. 492.

§12. 897.

5. Bac. Ab. 214.

Hollingworth against Ascue.

CASE 14.

Easter Term, 35. Eliz. Roll 1255.

DEBT upon an obligation of 300l. The defendant demanded *oyer*; and upon entry in *hac verba*, it appeared that it was a statute staple of 300l. acknowledged by the defendant and two others before the mayor of *Lincoln*: but because the seal of *Lincoln* annexed thereto was not a seal of two pieces, according to the form of the statute of *Aston Burnell*, it had been ruled before betwixt these parties, that it was not a statute staple (but void as a statute staple); wherefore he now brought his action of debt as upon an obligation at the common law: and it being hereupon entered, the defendant pleaded, that it appears that two others were bound jointly with him, who are yet alive, and not named. Judgment *fi actio*, &c. against him only. Upon this plea it was demurred.—HARRIS, *serjeant*, argued for the defendant, that the writ should abate, because they three are jointly obliged, and none of them without the other can be sued; as 4. *Hen. 7.* and 17. *Eliz.* are. Also debt cannot be brought upon this statute; for being void as a statute, it cannot be brought as upon an obligation: and debt lies not upon a statute staple; as appears by 4. *Edw. 4.* 5. *Edw. 2.* "*Debt*," 167.—OWEN, *Justice*, held, that the action lay; for he doth not declare upon the statute, but he declares that he was bound by obligation: and when you say that you and two others acknowledged a statute unto him, that is not any answer unto him. Also, the plea is not in abatement, because it is not averred that the other two did en-

A statute staple by two obligors which is void as a statute for want of the formalities required by the act of parliament, may be sued against one obligor, in an action of debt as on a bond.

Ante, 7. 319.

321. 307.

Post. 461. 494.

544.

Moor, 405.

Gould, 137.

Lut. 696.

1. Saund. 291.

1. Sid. 238.

1. Vent. 34.

2. Mod. 242.

Strange, 503.

1. Peer. Will.

337.

Sherp. Touch. 36.

HOLLING-
WORTH
against
ASCUE.

Ante, 319.

9. Co. 137. a.
Ante, 7.
Co. Lit. 36. a.

(a) See the continuation of this case, post. 461. ; and its conclusion, post. 494, 495.

CASE 15.

Waste must be brought in the *tract* or *tenet* ; but this action will not lie by a remainderman in tail against the husband of a tenant for life after her death ; and if it did, he may plead that he delivered the deed of feoffment to uses to the plaintiff, in satisfaction.

1. Roll. Ab. 128.
266.
2. Roll. Ab. 31.
873.
3. Com. Dig.
626.

seal and deliver it as their deed ; for otherwise it shall not be intended but that the now defendant sealed and delivered it only : and so is the course of pleading, as appears in 28. *Hen. 6.* and 17. *Eliz.*—BEAUMOND *accord. in omnibus* ; for a defendant shall not take advantage of a joint bond, unless he avers that the others delivered it also : and that debt lies upon a statute, or it is extendible, at the election of the party. — WALMSLEY. The statute compriseth two things : by the words "*teneri et obligari*," it is an obligation : by the words "*concessit quod levetur de terris*," it is a statute whercupon debt may be brought.—ANDERSON, *Chief Justice*. Debt may be brought upon a statute staple or merchant ; for the words "*obligari et teneri*" make it an obligation, although it be not a statute to some intent : and by delivery of the party it is an obligation ; but not a statute until the mayor's hand be thereto : and a delivery may be without words of delivery ; as it hath been adjudged, that one made a release, and cast it upon the table, and said, "There, this will serve," this is a good delivery. And to aver that the other two delivered it, he conceived it to be needless ; for it shall be intended to be so if the plaintiff doth not shew the contrary. Wherefore, &c. *Et adjournatur*.—But afterward in the next Term it was adjudged for the plaintiff, that debt well lies upon the statute as upon an obligation ; and it shall not be intended that the others sealed it without averment, &c. And a writ of error was brought, which is yet depending (a).

Sacheverel against Bagnoll.

WASTE. The plaintiff counts, that one *Elizabeth Bingham* was seised in fee, and by deed enfeoffed *Sir Gervise Clifton* and others in fee to the use of the said *Elizabeth* for life, and after to the use of *Eliz.* her daughter for life, remainder to the plaintiff in tail ; that *Elizabeth* the feoffor died, and *Eliz.* the daughter took the defendant to husband, who committed waste, and his *feme* died ; and for that waste done during the coverture this action was brought ; and it was not brought in the *tenet* nor *tenuit*.—Wherefore for this cause THE COURT held the writ to be ill.

The defendant pleads in bar (confessing all the matter precedent) a concord and satisfaction, *viz.* that the feoffees gave and delivered unto him the deed of feoffment to uses, which he delivered to the plaintiff in satisfaction of the waste, &c. And it was thereupon demurred, and argued by SAVELL that it was not any plea.—First, Because it is an action founded upon a statute, and in the realty, wherein concord is not any plea ; and in proof thereof relied upon 1. *Hen. 7.* and 13. *Hen. 7.* where it is held, that concord is not any plea.—Secondly, Because the concord alledged is by the delivery of a deed to the plaintiff which belonged unto him, and so it cannot be any satisfaction ; as 33. & 38. *Hen. 6.* a deed of the gift of intail to the issue in tail cannot be any satisfaction. So 9. *Edw. 4.* and 19. *Eliz. Onely's Case*, accord upon this reason. Wherefore, &c.—WARBERTON *à contra*. First, the writ of waste is not *tenet* nor *tenuit*, and therefore it is not good, because it is variant from the form of the *Register* ; for it ought to have been the one way, and to make his count special.—And of that opinion was THE COURT, that for this cause the writ was ill ; as also because the writ supposeth, that the *baron fecit* *vastum* ;

vastum; whereas the *baron* being charged as tenant in right of his *feme*, the writ ought to have been *fecerunt vastum*; for so is the form in the *Register*; and so is *Natura Brevium*. And to this opinion THE COURT agreed, the form also of the writ was ill for this cause; for in debt against them, for debt of the *feme's*, it shall be *debent*, &c. THE COURT also conceived, that the writ lies not against the *baron* for waste committed by him in the time of his *feme*; for he is to be charged by reason of his *feme*, and jointly with her; and she being dead, the action is gone; for it is but a personal wrong done by her. But the prothonotaries informed the Court, that an action of waste hath been brought against the *baron* for waste done in the life of the *feme*; and the writ was, *quod tenuit in jure uxoris*; and it hath been maintained. But the Court said, they greatly marvelled at it. *Vide* 10. *Hen.* 8. *pl.* 11.—But for the matter all THE COURT resolved, that it was a good bar, admitting that the action lies; for it is in its nature personal; for damages only are to be recovered, and not the place wasted: and, in every action personal, concord with satisfaction is a good plea; and therefore in an attaint, concord is a good plea (a): but where land is to be recovered by a writ of waste, it may peradventure be otherwise; as 11. & 13. *Hen.* 7. *et* 10. *Eliz.* 2. *Dyer*, 277. are. And here the delivery of this deed is good matter of satisfaction; for the deed did not appertain to *cestuy que use*, but to the feoffees by the common law; and the statute doth not transfer it unto him; then by consequence the gift by the feoffees to the defendant is good, and the delivery thereof by him to the plaintiff is good satisfaction. And WALMSLEY cited, that it was adjudged in one *Ekin's Case*, wherein he was of counsel, that the deed appertained to the feoffee, and not to *cestuy que use*. Wherefore it was adjudged for the defendant.

Hill against Hart.

WASTE. A special verdict was found, that the plaintiff had but a third part of a reversion, in common with two others: and, Whether he should have waste, the others not named? was the question; for it was said that this action is *quasi* in the realty.—But THE COURT held, that the action lies not for one tenant in common sole; for damages, and the place wasted, are to be recovered by moieties or a third part: it is also inconvenient that the third part should be recovered and delivered in execution.—But it was moved, that this matter of tenancy in common ought to have been pleaded; otherwise the defendant shall not take advantage thereof; for the issue here was joined upon a collateral matter, *viz.* upon the devise of a reversion, &c.—But THE COURT spake not thereto. *Sed adjournatur.*

Brown against Peys.

TRESPASS. Upon a special verdict the case was, *John Warners* was seised of the manors of *Warners* and of *Church-hall*; and devised the manor of *Warners* to the eldest son of his cousin *Richard Foster* in fee; and devised the manor of *Church-hall* to one *Margery Waters* for life, remainder thereof “to such of my cousin *Richard Foster's* children as shall then be alive and have the manor of *Warners*,” and died. The eldest son of *Richard Foster*

“such of *A's* children as shall then be alive and have the manor of *X.*” The devise of *X.* enters and aliens; and then *B.* dies, leaving the eldest son of *A.* the manor of *Z.* shall go to the heir of the deviser. *Co. Lit.* 27.

SACHSEVERAL
against
BAGNOL.

Post. 462.
2. Ro. Ab. 314.
5. Co. 75. b.
Co. Lit. 54. a.

9. Co. 78. b.

(a) 15. *Edev.* 4.
11. 1.
6. Co. 44.
Dyer, 75.
Ante, 154.
Post. 496.
2. Ro. Abr. 31.
Cro. Jac. 217.
342.

CASE 16.

Quere, If one tenant in common can bring an action of waste, without naming his co tenants?
Moor, 388.
Co. Lit. 197. b.
Comp. 219.
1. *Term Rep.* 759. n.

CASE 17.

A man having two manors devises the manor of *X.* to the eldest son of *A.* in fee: the manor of *Z.* to *B.* for life, with remainder “to

BROWN
against
PEYS.

entered into the manor of *Warners*, and aliened to *Lord Rich* in fee. Afterwards *Margery Waters* died, the eldest son of *Richard Foster* then living. And, Whether he should have the manor of *Church-hall*, or any other of the sons of the said *Richard Foster*; or, Whether the heir of the devisor should have it? was the question.—*WARBERTON*, *serjeant*, argued for the plaintiff, that the eldest son of *Foster*, notwithstanding that he had aliened the manor of *Warners*, so as he had it not at the time of the death of *Margery*, yet by the intendment of the will should have the manor of *Church-hall*; for the words of the will being, “and if she die, any of my cousin *Foster*’s children then living which shall have the manor of *Warners*, he to have the manor of *Church-hall*,” are words demonstrative to shew, that he who should have the manor of *Warners* should have the manor of *Church-hall*; and the party is sufficiently shewn, although he had aliened the manor before: as 15. *Eliz. Dyer*, 323. devise to *Jane* his daughter was good, although she were a bastard. So *Hil. 30. Eliz. Rot.* 336. in the queen’s bench, betwixt *Chapman* and *Thomson*, a man devised lands which he had bought of one *Kingsmill*, who had sold it to another, and he to the devisor, yet it was a good devise; and although he had aliened it, yet he is the party who had it: as tenant in dower, or tenant by the curtesy, although they alien their estates, yet they shall be sued in waste: and if in this case the eldest son had been disseised or evicted from the manor of *Warners*, it is not reason he should lose the benefit of *Church-hall* also. Wherefore, &c.—But all THE COURT, after argument on all sides, resolved to the contrary: for in wills the words ought to be observed as near to the intent as may be; and therefore the devise being “to one of *Richard Foster*’s children,” his child’s child shall not have it; for it is out of the words. It ought also to be such a child as then should have the manor of *Warners*; for there are two descriptions who shall have it, and both of them ought to meet together at the time of the devise executed; otherwise he shall not take thereby: *viz.* he ought to be a child, and such a child as then should have the manor of *Warners*; for his intent was, that both manors should go together. Therefore it was adjudged accordingly for the defendant.

Do. Lit. 54. a.

CASE 18.

Wright against Moorhouse.

Michaelmas Term, 35. & 36. Eliz. Roll 517.

Words which
touch a man in
his office and
credit are
actionable.
Ante, 306.
Cro. Car. 14.
223.
4. Co. 16.
1. Lev. 280.
Cro. Jac. 240.
1. Ro. Ab. 48.
3. Mod. 270.
Salk. 685.
Str. 420. 1158.

ACTION for these words: “Before the plaintiff came to the service of the Merchant Taylors, he dwelt in *Shrewsbury*, and set the town together by the ears; and so long as he was there, they were never in quiet; but afterwards they lived quietly: and he being clerk to the Merchant Taylors, was of consent and counsel with *W. Goodlaw* to deliver the books of the corporation which he had in his keeping, to the intent that thereby some of the lands of the same corporation might be found concealed.—It was thereupon demurred, Because that for none of these words an action lies.—But, after argument, THE COURT resolved for the plaintiff; for these words touch him in his office and credit; for his office is an office of trust, and these words touch him therein. *ANDERSON* said, If one saith to a counsellor, “Thou didst disclose my counsel;” or to a justice of peace, “Thou art a false,” or, “a lewd justice,” or, “Thou dealest corruptly,” or, “Thou dost not administer true justice,” an action lies. *BEAUMOND* said, if one saith to a counsellor or attorney, “Thou didst deliver my evidence to my adversary,” an action lies. Wherefore it was adjudged for the plaintiff.

Sir Edward Cleer *against* Peacock and Others.

CASE 19.

QUARE IMPEDIT. The plaintiff declares, that *Sir Richard Fulmerstone* was seised of the advowson of *D.* in fee; and devised it for ten years, remainder to *Sir Edward Cleer* in fee. The defendant by his bar confessed the devise for years; but that the devise was after to *Sir Edward Cleer* and his *feme*, and their heirs, upon such condition, that if they did not such an act their estate should cease; and that it should be to the defendant; and shews the breach, &c. Whereupon it was demurred. First, Because the plaintiff entitles himself by a devise in fee absolutely; and the defendant pleads a devise unto him and his *feme* upon condition, and takes not any traverse. Secondly, that by a will an estate in fee cannot be limited to cease, nor a remainder to be limited over (a). Thirdly, it was moved, Whether there may at this day be a devise of an advowson in gross?—*HARRIS, serjeant*, argued, that the bar was not good without a traverse; and in proof thereof relied upon 19. *Hen. 6.* 13. To the second, that the condition is void; for an estate in fee cannot cease upon such a limitation, nor another estate rise thereby; nor can an estate of inheritance be limited to cease; as 2. & 3. *Phil. & Mary*, 127. 11. *Hen. 7.* 6. and *Scholastic Case*: but there the estate devised was an estate tail; and therefore differs from this case, 28. *Hen. 8.* 33. To the third, that it is not devisable; for it is not valuable, nor within the intent of the statute.

DREW, à contra. First, that the bar is good without traverse; for when the *baron* survived, he might plead it as a devise made unto him sole; 17. *Edw. 4.* pl. 7. 35. *Hen. 6.* pl. 38. Secondly, An estate in fee, as well as an entail, may determine upon a limitation; and agreed that a remainder cannot be limited upon an estate in fee determined, but upon an estate determinable upon a limitation it may. Thirdly, it is devisable; for it is an hereditament, and lies in tenure; as 5. *Hen. 7.* 37. & 43. & 31. are: and it is valuable; for it is assets in a *formedon*. Wherefore, &c.

THE JUSTICES spake not to the two first points; but to the third, *ANDERSON* conceived clearly, that it is not devisable; for it is out of the letter and intent of the statute; for a devise shall be but of such things which are departible, and of an annual value; for the queen ought to have the third part thereof, or the third part of the value thereof; and this is not partible: and although it may be holden, and is assets in a *formedon*, yet it is not assets in debt; for it is not of an annual value, and so cannot be devised. So it is of liberties and common *sans number*; they cannot be devised, because they be not departible. And so it was agreed in *Lord Monjoy's Case*, for the manor of *C.* that neither customs nor liberties in gross are devisable.—But *WALMSLEY, BEAUMOND*, and *OWEN* held, that it is well devisable; for the body of the act is, that lands, tenements, and hereditaments may be devised; and this is an hereditament; and there is not any mention therein that it shall be of things valuable: nor is there any mention of value, but in the saying; and that is, that the queen shall have the third part, or the value of the third part, which may well be; for it is not of necessity that they should be things of annual value which should be devisable: and an advowson is an hereditament departible, as betwixt sisters; and dower shall be thereof (a); and it is valua-

An advowson in gross, held in *capite*, is a valuable hereditament, and devisable by the statute of wills,

(a) Ante, 30. Cro. Jac. 593. Dyer, 33. 1. Eq. Cas. Ab. 187. 2. Vezey, 420. Post. 361.

Co. Lit. 18. a.

Ante, 142. 103. Post. 361.

Co. Lit. 374. b.

3. Rep. 32.

10. Rep. 81.

2. And. 22.

W. Jones, 17.

23. 17.

Hob. 303.

1. Vez. 227. 422.

1. Atk. 619.

621.

3. Atk. 640.

3. Bro. Par.

Cas. 557.

2. Vern. 748.

1. Bl. Rep. 1140.

Powellon Dev.

230.

(a) Perk. 343. F. N. B. 143. Co. Lit. 52. 379. Cro. Jac. 621. 691. 3. Leon. 155.

SIR EDWARD
CLERE
against
PEACOCK
and OTHERS.

ble, viz. twelve-pence in the pound; as 12. Hen. 8. pl. 8. and other books are. And the statute shall be well satisfied; for of things valuable the queen may have the third part or value of them; and if they be not valuable, the third part, howsoever they be: and it is clear, that an advowson appendant, and liberties appendant to land are devisable, as those which are arising out of the land; and a reversion upon an intail, whereunto no rent is annexed, is devisable, yet it is not of any annual value. *Sed adjournatur.*

CASE 20.

James Cogan against Catherine Cogan.

Easter Term, 38. Eliz. Roll .

A. seised in fee
let to B. for life,
remainder to C.
for life, "provi-
" ded, that if
" A. should
" have a son
" which should
" live to the
" age of five
" years, the
" estate limited
" to C. should
" cease, and the
" land remain
" to that son in
" tail."—The
estate limited
to the son is
void; because
limited on a
condition which
was to defeat
the preceding
remainder to C.
11. Hen. 7. pl. 6.
13. Hen. 7. pl. 23.
Ante, 209.
Con. 361. t.
Co. Lit. 218. a.
224. a. 378. a.
Noy's Max. 123.
Sect. 720. t.
2. And. 138.
1. Ro. Ab. 407.
472. 474.
Plowd. 25. h.
23. d. 32.
4. Ba. Ab. 319.
Doug. 263.
508. 758.

TRESPASS upon demurrer. The case was, That John Cogan was seised in fee, and let it to Robert Cogan for life, remainder to Catherine the defendant for life: " PROVIDED, That if John, the lessor, had issue a son during his life, who should live to the age of five years, that the estate limited to the defendant Catherine should cease; and it should remain to the said son in tail." The lessor had issue the plaintiff, who attained his age of five years: and, Whether the remainder limited to the defendant shall cease, and the remainder limited to the plaintiff were good or not? was the question.

After the *Serjeants* had argued the case, it was resolved by THE COURT for the defendant. For ANDERSON said, there are certain rules in law touching remainders, viz. that a remainder ought to pass at the first by the livery, and shall not take effect with a condition precedent; nor shall begin upon such a condition: and although *Coltburst's Case* gives colour thereto, and that the remainder in question shall be good; yet he held not that case to be law in this point; for a remainder depending upon a condition precedent is merely void: and further in this case, an entry is requisite to avoid the remainder for life; for a freehold cannot determine without the ceremony of entry; but otherwise it is of a lease for years. Wherefore this remainder, depending upon a limitation which is against the rules of law, is void.

WALMSLEY to the same intent. The remainder is void by *Littleton*, and by the ancient grounds of a law; for the remainder (by *Littleton*) ought to pass at the time of the livery; and the nature of a livery is a giving; and there cannot be a giving, but there ought to be one to take in *presenti*, or in *expectancy*; so as the law shall preserve it in the *interim*; and there needs not be any deed of a remainder, which proves that it passeth by the livery; and by *Richild's Case*, the remainders shall take effect when the particular estate takes his effect; and ought to pass presently by the livery, or otherwise will never pass: and although in *Coltburst's Case* the condition be precedent in words, yet it is subsequent in reason; wherefore it may be well maintained by law: and a remainder cannot pass by contingency; for then there would an absurdity follow, viz. there should, by the first livery, be an immediate reversion expectant upon the remainder for life; and afterward this remainder shall be turned out, and the reversion also; and a new remainder, and reversion should come in place of them; so as there should be turnings out and turnings in at several times, by one livery which was made at one time. But

as touching the ceasing of the estate in remainder, he conceived it might very well be without any entry by the operation of law, the particular estate remaining in being. Wherefore, &c.

COGAN
against
COGAN.

BEAUMOND to the same intent. For a remainder ought to begin and be created with the first livery, and concurrent with the other estate; and cannot afterwards begin upon a condition. And he said, he never had heard or read, that a *proviso* could create a remainder; although it might determine a remainder: but he held, that a remainder of an estate of freehold or inheritance cannot cease without entry or claim; no more than an estate of freehold in possession.—OWEN agreed with BEAUMOND in omnibus, for the reasons before specified.—Wherefore it was adjudged for the defendant.

Post. 379.
Ant. 359.

Dawbridge against Cocks.

CASE 21.

TRESPASS. The question was, Whether a copyholder might lop off the boughs without special custom?—And it was resolved PER CURIAM, that by the common law he may cut off the under boughs, which cannot cause any waste: but the amputation of the top boughs will cause the putrefaction of the whole tree. Wherefore this is waste, as well as the decapitation thereof, &c.

A copyholder may lop, but not destroy the trees of his estate.
Ant. 5.
1. Brownl. 132.

Paulker against Cornhill and Others.

CASE 22.

EJECTIONE FIRMÆ.—Upon evidence it was held, that the husband shall not be tenant by the courtesy of a copyhold, unless there be an express custom to warrant it.—It was also held by all THE COURT, that if a copyholder surrender in tail, and the heir of the donee is to bring a *formedon*, he ought to count of the gift made by the copyholder who surrendered, and not by the lord; for he is but the instrument to convey it, and nothing passeth from him.

A husband cannot be tenant of a copyhold by courtesy except by special custom.
Post. 442. 582.
4. Co. 27.
Gilb. Ten. 158.
1. And. 192.
2. Leon. 109. 208.
1. P. Will. 69.
Ld. Raym.
630. 1145.

It was also moved, Whereas the surrender was to the use of one in fee, upon condition to pay 100l. to a stranger; and if he failed, that it should be to the use of a stranger in fee; whether that were a good limitation to the stranger, so as there should be a fee dependant upon a fee?—THE COURT spake not much hereto, but willed to have it specially found; yet BEAUMOND conceived it to be good enough: for it shall be as an use limited upon a feoffment; and these uses shall rise out of the first surrender (a).

(a) Ante, 359.
Gilb. Ten. 262.

Fourthly, Whether in this case (upon the tender of the 100l. to a stranger, and he refusing) the condition be saved, forasmuch as it is to be done to a stranger.—BEAUMOND. There is difference where one is obliged to do an act to a stranger, and he refuseth, the obligation is not saved, for he takes upon him to do it, and where a lease, or feoffment, or surrender is made as here, upon such a condition, for herein it is otherwise.—But the Court moved, that it should also be specially found.

Ante, 399.
Post. 694.
Co. Lit. 209.
Gilb. Ten. 276.

Archer against Green.

CASE 23.

FORMEDON. The tenant pleads a fine with proclamations in bar, by one Richard, the demandant's ancestor. The plaintiff replies, that Richard entered upon his father, being tenant in tail, and levied the fine; and before the proclamations passed, the father re-entered, and died, &c.—And by THE WHOLE COURT it

A re-entry before the proclamations have passed, will destroy the fine.
was Dougl 483.

ARCHER
against
GREEN.

3. Co. 90.
Ant. 122.

was held to be a good replication; and the bar well avoided. For when the father re-entered before all the proclamations passed, the fine thereby is avoided to all purposes; as well to himself as to the son who levied it. But if the proclamations had incurred before his entry, although he had re-entered within the five years and died, yet it should have bound the son and his heirs for ever.

CASE 24.

Strowd against Willis.

Michaelmas Term, 36. & 37. Eliz. Roll 312.

In debt on bond conditioned for the payment of rent reserved upon a demise according to certain articles, the defendant is estopped to say he had not any thing in the land demised by the articles.

Ante, 122.

Post. 756. 769.

1 Roll. Ab. 372.

2 Roll. Ab. 454.

Co. Lit. 47.

Poph. 114.

Owen, 110.

Moor, 405.

Cro. Jac. 312.

2. Co. 33. b.

Allen, 52.

1. Leon. 156.

1. Salk. 277.

Str. 680. 818.

3. Bac. Ab. 441.

Dougl. 159.

1 Term Rep.

26. 501.

2. Term Rep.

171.

DEBT upon an obligation, conditioned for the payment of 37l. 10s. rent, reserved upon a demise of copyhold land for forty years, according to such articles indented. The defendant pleaded, that he had not any thing in the land demised by the said articles. It was thereupon demurred.—SAVELL, *for the plaintiff*. He is concluded by the recital of the obligation, and also by the articles, 5. *Hen. 7. pl. 20.* Against a lease by indenture, the lessee shall not say, that the lessor had nothing to let; and by a bare recital in an obligation, one shall be estopped; as 13. *Edw. 4. pl. 4.* is. And a recital by a single bill shall estop the party. 25. *Edw. 4. pl. 54.* a recital by an obligation, that he made a will, he is estopped to say the contrary; and 2. & 3. *Eliz. Dyer*, 190. accord.—*DREW, to the contrary.* For where one is obliged to pay rent, if he cannot enjoy the land, he is not bound to pay it; and therefore 14. *Edw. 4. pl. 4.* 20. *Hen. 6. pl. 22.* *Hen. 6. pl. 57.* the tender thereof shall be upon the land, and not to the person. 21. *Hen. 7. pl. 6. the Dean of Windsor's Case*, it is ruled, that if he cannot enjoy the land, he shall not pay the rent. And as to the estoppel by the recital, there is a difference where it goes in the generality, and where in the particularity; for where it is in the generality; as to infeoff one of all the lands descended unto him, or to be non-suited in all actions depending in the common pleas; he shall not be estopped to say, that he hath not any land, or that he hath not any action depending there, 18. *Edw. 4. pl. 4.* Against a condition to perform all covenants, a man may say, that there were not any covenants; and 21. *Hen. 4. pl. 54.* agrees with this difference.—And of this opinion were all THE COURT at the first; but afterwards, upon a second argument, they conceived that he should be estopped. Wherefore it was adjudged for the plaintiff.

CASE 25.

Agnes Fowler against Dale.

Hilary Term, 36. Eliz. Roll 42. or 421.

"Inhabitants" cannot prescribe to have a right of common.
Ante, 180.
Post. 441.

1. And. 51.

Sav. 81.

1. Leon. 44.

Godb. 96.

Owen, 4.

Gouldf. 33.

6. Co. 59.

Cro. Jac. 154.

2. Bl. Rep. 927.

REPLEVIN. The defendant made confuſance as bailiff of Sir Thomas Hatton, the place where, being part of the manor of Benyfield; and that the vill of Benyfield is an ancient vill; and that in the said vill *habetur talis consuetudo, et a tempore quo, &c. habebatur, &c. quod quilibet inhabitans in aliquo antiquo messuagio* within the said vill, should have common in the said waste for all his beasts *levant et couchant* within the said vill; and that he was an inhabitant, &c. And issue was joined upon this prescription, and found for the plaintiff; and it was moved in arrest of judgment, that it was a void and ill prescription for every inhabitant to prescribe, &c. and therefore the bar was ill, and the issue being joined upon an ill bar, the plaintiff is not to have any judgment.—YELVERTON moved for the plaintiff to have judgment;

ment; for it is pleaded by way of custom and usage, and it is not a prescription, which may be well enough; for common may be as well by reason of inhabitancy, as otherwise. And 22. Hen. 6. pl. 43. common may well be appendant to an house; so it is 10. Hen. 7. pl. 24. 15. Edw. 4. pl. 32. It is said there is not any difference betwixt common appendant, and common by reason of inhabitancy; so as it is there admitted, that there may be common in respect of inhabitancy.

FOWLER
against
DALE.

It hath been objected, that inhabitants are not persons able to prescribe. But it was thereto answered, that it is not here alledged to be in the person, but to be the usage of the village. Vide 18. Hen. 8. 11. Hen. 6. Prior of Dunstable's Case, 7. Edw. 4. pl. 24. 15. Edw. 4. pl. 29. 18. Edw. 4. pl. 3. 20. Edw. 4. pl. 10. and second Mariae, "Præscriptio," Bro. 100. Inhabitants cannot prescribe; but a custom may be alledged, that inhabitants may have common. Wherefore, &c.

Ant. 180.

ANDERSON. It hath been adjudged lately in this court, that it is a void and idle prescription, and I can shew the roll thereof; and there is not any colour against it, for an inhabitant cannot have common, if he hath not an interest or estate therein; and this is not shewn in such a prescription; wherefore it is not a good prescription. Also if he be ousted thereof, he hath not any remedy nor action for it, but the lord who is the owner thereof; and therefore the interest shall not be taken from the lord; and the lord and the inhabitants cannot both have interest therein.

Co. 6. 60. 2.

WALMSLEY. Such a prescription cannot begin at this day, and therefore continuance cannot make it good: for a grant of common *inhabitantibus* cannot be good, because they are not any corporation; and by prescription it cannot be good, for it is in nature of a purchase; and an inhabitant cannot purchase to himself and his successor.

Ant. 35.

BEAUMOND. This is not any of the four commons, viz. appendant, appurtenant, in gross, or vicinage; wherefore it is no good common.

OWEN accord. ; for they are not any corporation to prescribe: but a freeholder may alledge that he is seised, and that he and all those, &c. have had common, and that is a good prescription. —But all THE JUSTICES held, that usage may be alledged by reason of an inhabitancy to have an easement, but not to have inheritance.

Co. 6. 60. 2.

Ant. 180.

ANDERSON. It is the common course throughout England; and it is absurd and *oppositum in objecto*, that the common should be in the inhabitant; for it should be mischievous to take it by a prescription from the owner of the soil. And it is not possible that should be good by usage, which cannot have a lawful continuance. And custom and prescription are all one. Wherefore, &c.—*Sed adjournatur.*

Jesop against Payne, Parson of Upwey.

CASE 26.

PROHIBITION prayed for suing for tithes of locks of wool, suggesting, that he paid the tenth fleece of wool in satisfaction for all locks, and tithes due for wool.

A modus to pay the tenth fleece, in lieu of locks and tithes of wool is good. Post. 446. 475. 609. 660.

DREW moved, that the prescription was not good; because it is but to have the same thing and of the same nature in recompence.

Dough. 204.

JESOP
against
PAYNE.

pence. And it hath been ruled in the queen's bench, to give the tenth sheaf in satisfaction of the tithe of the corn, and rakings; is not sufficient to maintain a prohibition. And there in 33. *Eliz.* in the case of *Shakerly against Sir James Marvin*, it was held, that it was not any prescription to have cocks of hay for all tithe-hay. —THE COURT held, that in this case the substance of the prescription was good enough, and agreed to the case of the rakings; for that is as good corn as any other, but locks be not of the same value with the fleece. But in regard of a fault in the suggestion, that it was not, "that they usually had paid, &c." which is issuable, it was not good. And therefore they held that consultation should be awarded.

CASE 27.

Charnock against Sir Thomas Gerard.

An *audita querela* lies in the common pleas upon a statute staple.

AUDITA QUERELA. For that the conusee upon a statute staple had purchased part of the land, and the plaintiff another part, and yet had caused the plaintiff's lands to be extended and delivered in execution. And it was held to be a good cause for an *audita querela*. —It was then moved to have a *superfedeas* to stay execution; for although they were extended, yet they were not delivered by *liberate*. And THE COURT doubted, because it was upon a statute staple, which was not returnable in this court, but in the chancery: but it well may be upon a statute-merchant; for that is always returnable in this court. But the prothonotaries said, that an *audita querela* lies well in this court, in this case; and a *superfedeas* should be awarded, as it was in the case of *Lord Dudley*; and divers other precedents accorded therewith. Whereupon THE COURT afterwards resolved, that it well lay here, and a *superfedeas* was thereupon awarded.

CASE 28.

Stainfield and his Wife against Viscount Bynden.

Michaelmas Term, 35. & 36. Eliz. Roll 1434.

An assignment of dower by commission *de dote assignanda* out of the court of wards, is no bar to dower at the common law, for the writ must issue from the chancery.

Dyer, 363.
Co. Ent. 173.
2. Mod. 18.
F. N. B. 263.
2. Inst. 38.
2. Brownl. 126.
Co. Lit. 38.
9. Co. 16.
7. Mod. 43.

DOWER. The tenant pleads in bar, that the wife of the demandant was endowed by commission out of the court of wards *de dote assignanda*, which she accepted, and demanded judgment *si actio, &c.* It was thereupon demurred. —And after argument by the *serjeants*, THE COURT resolved for the demandant; for they conceived, although the 32. *Hen. 8. c. 46.* for the authority to the court of wards, yet the authority of the chancery is not transmitted to the court of wards: for the marriage ought to pass under the great seal; the office ought to be always returned into the chancery; the livery shall be always sued out of the chancery; and all other acts (saving the survey of the wards, lands, and letting it for years) shall be in the chancery, and not in the court of wards; and therefore an assignment by commission out of the court of wards (a) is void, and shall not bind him, and no act there shall bind the heirs; or any other men's inheritance: but this dower ought to have been assigned out of the chancery by a writ *de dote assignanda*; and if it be evicted, the record shall be transmitted into chancery, and there she should be endowed *de novo*. Wherefore it was adjudged for the demandant.

(a) Abolished by 12. Car. 2. c. 24. — See 3. Bl. Com. 258.

37. Eliz. In the Queen's Bench.

Sir John Popham, *Knt. Chief Justice.*

Sir Francis Gawdy, *Knt.*

John Clench, *Esq.*

Edward Fenner, *Esq.*

Sir Edward Coke, *Knt. Attorney General.*

Sir Thomas Fleming, *Knt. Solicitor General.*

} *Justices.*

Wesbys *against* Skinner and Catcher, late Sheriffs of London.

CASE 1.

Hilary Term, 34. Eliz. Roll 169.

DEBT upon an escape. Upon *nihil debet* pleaded, a special verdict was found, that the prisoner for whose escape the action was brought, was in execution in the counter at the suit of one *Dighton* for 200l. and at the suit of the plaintiff for 440l.; that the defendants *in exitu ab officio* delivered him as in execution for one cause only, *viz.* at the suit of *Dighton* to the new sheriffs, and they suffered him to escape. For this escape the action was brought against the ancient sheriffs; and, Whether upon this matter the action lies against the defendants, or ought to be brought against the new sheriffs, because the *tert* began first in them? was the question.

An old sheriff must deliver over to his successor by indenture all the prisoners in his custody charged with their respective executions; and if he omit any, it will be deemed an escape.

TANFIELD. The new sheriffs are chargeable; for there is not any law to compel the ancient sheriffs to deliver the prisoners by indenture with their causes; but the new sheriff ought at his peril to take notice especially of executions, which are upon and out of the records; for he ought to be attendant upon every court at *Westminster*, and to have his deputy in every court, whereby he is to be informed of every execution issuing out of every court. And in divers cases a man must take notice at his peril of acts, of which by intendment he may have conusance: as lessee for life shall take notice of livery made upon the land, so lessee for years or for life shall take notice of the grant of a reversion by deed enrolled. And in 16. *Eliz.* it was ruled in one *Wyse's Case*, where a writ of discharge was shewn in the county court for the ancient sheriff, who was not present, that he ought at his peril to take notice thereof. So executors ought to take notice of every judgment against their testator: and if in this case the ancient sheriff had died, and a new sheriff made, he at his peril ought to take notice of the prisoners in execution, and of their causes. So here the new sheriffs, when they found him in execution, and so was lawfully under their charge. But if there had not been any cause certified of detaining him in prison, it might peradventure have been otherwise; for then, if they detained him in prison, they should have been chargeable

Co. 3. 71. b.
Hob. 266.
2. Roll. Abr.
457.
Bulst. 70.
2. Leo. 54.
4. Bac. Abr.
445.

3. Co. 72. b.

WESBYS
against
SKINNER and
CATCHER.

Ante, 12, 13.

3. Co. 72. a.

able in false imprisonment. Also in this case, they suffered him to escape before *Dighton's* debt was satisfied. Wherefore, forasmuch as he did a *tort* therein, it is reason he should the rather be charged therewith.

SNAGG *è contra*. The ancient sheriffs are not discharged, nor the new sheriffs charged, until three things be performed, *viz.* the patent to the new sheriff; the writ of discharge to the old sheriff; and the delivery of the prisoners by indenture to the new sheriff: and there is a writ in the *Register*, f. 295. that the prisoners and writ shall be delivered to the new sheriff by indenture. Wherefore, inasmuch that it was not done so, whereby the new sheriff might have conusance, they shall be charged, and not the new sheriff. Wherefore, &c.

POPHAM, C. J. and ALL THE COURT, GAWDY *absente*, held, that the ancient sheriff shall be charged, and not the new sheriff: for this delivery over of the prisoner, and writ by indenture, was by the order of the common law: and reason wills, that the sheriff should not have prisoners delivered unto him, but that he also should have the causes certified with them; and not to compel him to search out the causes of their imprisonment; and in regard there was a default in the old sheriff, that when they delivered the prisoner by indenture, they shewed but one cause only of his detainment, and not both. It is therefore reasonable they should rather be charged than the new sheriff; and it was an escape in them presently: for the prisoner when he is delivered to the new sheriff for one cause, although he be in execution for one cause, he is not of execution for the other: wherefore it is an escape *maintenant* in the ancient sheriff, and they are forthwith chargeable therewith; and the law will never charge the new sheriff, but where the prisoner is delivered unto him in the common gaol of the county, with the cause of his detainment, and he needs not otherwise to take him. And therefore in *Dawldridgecourt's Case* in this court; who being sheriff of the county of *Warwick*, and had a prisoner in execution (whom he kept in an house in *Warwick*, and not in the common gaol of the county) being afterwards removed from his office, would have delivered the prisoner to the new sheriff at the said house, who refused to receive him, unless he were brought to the common gaol, and afterwards the prisoner escaped; it was adjudged, that the said *D.* was chargeable with this escape, and not the new sheriff, unless he had been delivered unto him in the common gaol. And as to the case where the old sheriff dieth, that may be agreed to be good law, for it is of necessity, because there the new sheriff was to take notice at his peril. And it was afterwards adjudged accordingly (a).

a. Co. 72. b.

NOTE. GAWDY said unto me, that he was of the same opinion clearly, for the inconveniencies which otherwise would ensue to sheriffs, to inforce them to search all records out of every court, and in the interim not to know what to do with their prisoners, *Vide* 5. *Edw.* 4. *pl.* 71. 39. *Hen.* 6. *pl.* 33.

NOTE. A writ of error was after brought in the exchequer chamber, and after argument there, the judgment was affirmed. *Vide* 3. *Co.* 71.

(a) See 3. *Geo.* 1. c. 13. f. 8. and 20. *Geo.* 2. c. 37.

Stokes against Annesby.

CASE 2.

ERROR to reverse a judgment in a writ of dower in the common pleas. The error assigned was, For that in term *Mich.* 21. & 22. *Eliz.* Rot. 2315. *Annesby* brought a writ of dower against *Stokes*, returnable *quind. Martini*, at which day the tenant made default, and a *grand cape* was awarded returnable *octab. Purificat.* next following; at which day the tenant appeared and tendered his law *de non summons*, and had day to make it until *quinque septim. Pasch.* At which 5. *septim. Pasch.* the tenant *jett essoyne*, which was adjourned until *tres Trin.* 22. *Eliz.* at which day the tenant appeared, and the demandant released the default. And the tenant imparles until *Mich.* 22. & 23. *Eliz.* And upon the plea-roll, *Pasch.* 22. *Eliz.* it is entered, that the tenants then appeared and pleaded in bar; that the demandant detained charters from him, being feoffee to the *baron*; and issue was joined thereupon, which was afterwards tried in *Mich.* 23. & 24. *Eliz.* and found for the demandant; and the thereupon had judgment; and thereupon this writ of error was brought.

Error to reverse a writ of dower,

THE FIRST ERROR assigned was, Because this appearance and pleading in *Pasch.* 22. *Eliz.* at which day the party was out of court, by the *essoyn* cast and adjourned, is merely contrary to the record, and void; and therefore the issue joined and trial and judgment thereupon are altogether void.—But *COKE Attorney General*, and *GLANVILLE, serjeant*, moved, that the *essoyn*-roll and all thereupon should be void. For when the party appears, and pleads, that appearance confounds the *essoyn*; and that appearance and pleading is upon the plea-roll, which shall the rather and more forcibly be intended true than the other roll; for the plea-roll controls all other rolls.—But after divers arguments, the last day of this Term THE COURT resolved it to be error, for every roll hath his course and order. And when it appears that the tenant was *essoined*, and the *essoyn* adjourned until another Term, the parties thereby are out of court, and their appearance cannot be recorded. And in that an appearance is recorded, and a plea pleaded upon the plea-roll, it shall be intended to be a practice and mis-entry (as in truth it was, as appeared upon examination) than otherwise. Wherefore the first shall be intended the true roll, and all proceedings shall be according to it; and the appearance after, when none of the parties had day in court, is void: and so the plea pleaded, and trial, and judgment thereupon, are erroneous, and not aided by any of the statutes of *jeofails*. Wherefore for this cause they awarded, that the judgment should be reversed.

An appearance entered on the plea-roll, after an *essoyn* cast on the *essoyn*-roll and adjourned, is an error not aided by verdict.

Ante, 340.

Cro. Car. 92.
Gillb. C. P. 13.

A SECOND ERROR alledged was, That this plea of *detrainment of charters* by the feoffee, is a void plea *en son bouche* (which was agreed by ALL THE COURT); and then the issue joined thereupon is void, and so a mis-trial and *jeofail*: and of that opinion was *FENNER, Justice*. But it was thereto answered, that although it were an insufficient plea, yet it is not merely void; for it is a plea proper to this action: and issue being joined thereupon, and tried, it

If a tenant in dower, being feoffee, pleads *detrainment of charters*, an issue thereupon, is aided, after verdict, by 32.

Hen. 8. c. 30.

1. Com. Dig. 334.
is

Ante, 260. Post. 455, 778. 9. Co. 18. a.

STOKES
against
AMBREY.

is aided by the statute of *jeofails*, and not like where *not guilty* is pleaded in debt, or *non debet* in trespass; for those are mere void issues in those actions. But the other Justices did not speak much thereto, the judgment being reversed for the first cause.

CASE 3.

Ive against Ambrey.

Outlawry reversed for diversity in the name of the attorney.

Ante, 340.

Dougl. 114.

ERROR upon a judgment in debt, and outlawry thereupon. The error assigned was, For that the plaintiff appeared, and declared, and prosecuted *per Ivonem attornatum suum*, as the plea-roll was; but the roll of the warranty of attorney is *ponit Jovem son attorney*.—And for this cause it was held to be error, and should not be amended; but the judgment and outlawry thereupon was reversed.

CASE 4.

Hall against Combes.

Trinity Term, 34. Eliz. Roll 667.

A grant of all houses, mills, &c. in *A.* will not pass a mill in *B.*

2. Co. 33. a.

2. Term Rep.

498. 502.

EJECTIONE FIRMÆ of a lease of *Dodington* against the defendant, as tenant of one *Aylesworth*. Upon a special verdict the case was, that king *Henry* the eighth had two mills under one house, and granted to *Aylesworth* all the houses, mills, lands, &c. in *Wells*, and the suburbs and liberties thereof; and it was found that one of those mills was in *Wells*, and the other out of *Wells*, and the liberties and suburbs thereof: and, Whether this mill passed, forasmuch as they were both under one roof? was the doubt.—And adjudged for the plaintiff, that it passed not.

CASE 5.

Harford against Gray.

That which comes after the *seised* in pleading, is but conveyance.

REPLEVIN. The plaintiff in bar to the avowry made title to an hundred, that the abbot of *Abington* was seised in fee, and pleaded the 31. *Hen. 8. c. 13.* of monasteries; and that the abbot surrendered to king *Henry* the eighth, and that *POSTEA*, *scilicet*, 28. *Hen. 8.* king *Henry* the eighth died seised, and it descended to king *Edward* the sixth; and from him to queen *Mary*; and from her to queen *Elizabeth*, who now is, who granted it to lord *Norris*, who let to the plaintiff. Upon this bar, a demurrer was joined; and now exception taken, Because it cannot be that the abbot should surrender in 33. *Hen. 8.* whereas it is pleaded the king died in 28. *Hen. 8.*—But it was thereto answered by *TANFIELD*, that it was but a mistaking of the clerk, and might be well amended; for it appears that it cannot be, that king *Henry* the eighth died in the eight-and-twentieth year of his reign, where an act of parliament is pleaded in 31. *Hen. 8.* and a surrender in 33. *Hen. 8.* Wherefore that which comes after the *POSTEA* (*viz.* 28. *Hen. 8.*) is vain and void, and may be well stricken out, and yet the sense remain perfect enough, *viz. quod POSTEA*, he died seised; and in proof hereof he relied upon 11. *Hen. 7. pl. 3.* 20. *Hen. 6. pl. 15. & 11. Hen. 6. pl. 22.*—And of that opinion was all THE COURT, because it is not much material, but matter of conveyance only. *Sed adjournatur.*

Cro. Jac. 96.
Mo. 464.

Hore

Hoare *against* Broom.

CASE 6.

REPLEVIN. The parties being at issue, the jury appeared *in banco* to try it; and the defendant would have challenged the array, *ore tenus*, because it was returned by one *Stonner*, sheriff, two days after he had received a writ of discharge.—And it was held by THE COURT, that he could not challenge it for that cause; because it would be a direct averment against the record; for it is returned by him as sheriff; and the return accepted. But by advice of THE COURT, he made his challenge to the array, because it was favourably made and returned in favour of the party, &c. and issue being joined thereupon, and all this matter given in evidence, THE COURT directed the *tryers*, that it was not duly made and returned, for it was without warrant. Whereupon the array was quashed.

The array cannot be challenged if the cause of challenge contradicts the record.

2. Vent. 58.
3. Bac. Abr.
253. 275.

Jordan *against* Jordan.

CASE 7.

ASSUMPSIT. And declares, Whereas he sued a writ of *latitat* against the defendant, intending to sue him for a debt of forty pounds, directed to the sheriff of *Wilts*, and delivered it to *J. S.* to procure a warrant from the sheriff to arrest the defendant; and *J. S.* accordingly obtained a warrant; that the defendant, in consideration the said *J. S.* would forbear to arrest him, assumed to *J. S.* to appear in the queen's bench, at the day contained in the writ, or to pay the debt; and for non-performance of this promise he brought the action. The defendant pleaded *non assumpsit*, and found against him. And it was now alledged in arrest of judgment, because he did not shew how the debt grew due; nor *in facto* that there was any such debt due. Secondly, Because he declares of a promise made to *J. S.* and not to himself.—And for this cause principally it was held to be ill, and adjudged for the defendant.

The promise in an *assumpsit* must be to the plaintiff himself, and not to a third person; and the declaration must shew how the debt grew due.
1. Roll. Ab. 32.
Post. 849.

Bothwright *against* Harvy.

CASE 8.

Michaelmas Term, 36. & 37. Eliz. Roll 573.

DEBT upon an obligation of 120l. The condition was, That if he acquitted and saved him harmless from an obligation of 60l. wherein the plaintiff and defendant were obliged to *J. S.* that then, &c. The defendant pleads, that *J. S.* sued the plaintiff upon that obligation, and had judgment; but that before execution he delivered the sixty pounds to the plaintiff to satisfy it: and it was thereupon demurred.—Adjudged to be no plea; for although execution be not sued, yet by the judgment the party is damned, for his land and body are thereby liable; and although he pays the sixty pound debt, yet he doth not satisfy the costs. So the bond is not saved, for he doth not acquit nor save him harmless, as 2. & 3. Eliz. 186. is. Also the bond is conjunctive, "quit and save, &c." wherefore he ought to do both, which was not done. And it was thereupon adjudged for the plaintiff.

If a counter bond be given to save the obligee harmless from another bond in which he is the obligor, the covenant is broken if the original bond be put in suit, although the money is afterwards paid.
Ante, 264. 350.

1. Ro. Ab. 432.
Owen, 19. Cro. Car. 350. Yelv. 257. 1. Brownl. 24. 5. Co. 24. 1. Vent. 261.

CASE 9.

Philpot's Case.

Upon an *exigent* against husband and wife, if the husband only conform, the Court will not bail till the wife appear.
Post. 611.

1. Ro. Ab. 583.
Cro. Jac. 445.
Stile. 475.
1. Mod. 8.
6. Mod. 17. 105.
10. Mod. 163.
Ld. Ray. 73.
Salk. 115.
Str. 1167. 1237. pl. 4.
1272. 1. Term Rep. 486.

AN *exigent* was awarded against *Philpot* and his wife, and divers others, upon an indictment of recusancy. The husband appeared upon the *exigent*, and conformed himself according to law; but the wife made default, and did not appear. The husband prayed to be bailed *de die in diem*, until the appearance of his wife, for the default of the wife ought not to prejudice the husband. And the practice and usage of the common pleas is, where process of outlawry issues against *baron* and *feme*, and the *baron* appears, he shall have day by bail, until the appearance of his *feme*.—But THE COURT said, that it was in the discretion of the Court, when he came in upon the *exigent*, whether he should be let to bail. And this Court used not to let the *baron* to bail, but to continue him in prison for the contempt of his *feme*, until the *feme* comes in: wherefore the bail was refused. *Vide* 8. Hen. 4. pl. 6. 21. Hen. 6.

CASE 10.

Rotheram against Crawley.

Easter Term, 35. Eliz. Roll 332.

A release of all duties will discharge an obligor from the payment of a bond.

S. C. Owen, 71.
Raym. 399.
3. Co. 153. 2.

DEBT upon an obligation. The defendant pleads a release; and upon the pleading, the case appeared to be, that there were controversies betwixt the plaintiff, lord, and the defendant, being his tenant, for a relief and an heriot; and they having submitted it to arbitrament, it was awarded, that there should be a release made of them; and in performance of this arbitrament a release was made by these words: "of all reliefs, duties, and amercements;" and this release pleaded in bar of this obligation, which was not put in arbitrament, nor intended to be released. And upon all this matter disclosed, it was demurred.—COKE, *Attorney General*, moved, that it should not be a bar: for this word "duties" being placed betwixt "reliefs and amercements," shall be intended duties of such a nature, and not any other; wherefore it shall not extend to this bond.—But THE COURT held the contrary; for although the intent was not to extinguish it, yet "duty" extends thereto in extremity of law, wherefore it shall be an extinguishment and discharge of the bond. And thereupon it was adjudged for the defendant (a).

(a) Sed vide
a. Bac. Abr.
489. in notis.

CASE 11.

Thornborough against Monpenfon.

A covenant "to make such an assurance as counsel shall devise," expounded.

Cro. Jac. 251.

COVENANT. The covenant wherein the breach was assigned was, That he should make such an assurance as his counsel should devise of an annuity of twenty pounds; and alledgeth for breach, that his counsel devised that he should bind himself and his heirs by an obligation for the payment of this annuity yearly, which he had not done. And issue being joined thereupon, after verdict it was moved in arrest of judgment, that this was not within the covenant, and so no breach, for it is not any assurance of the annuity.—POPHAM. If a man covenant to make such an assurance of the manor of *D.* as his counsel shall devise, and the counsel deviseth an obligation or a statute to be made for the peaceable enjoyment thereof, he is not bound to make it (*quod CURIA concessit*.) But if the covenant were to do such act or acts for the assurance of the manor of *D.* as his counsel shall devise, and

and they devise a statute for the peaceable enjoyment thereof, he is bound to do it.—It was also moved, that this was not within the covenant, because the devise was, that he should bind him and his heirs; and there is not any word in the covenant, that the heir should be obliged; wherefore, &c.—But THE COURT gave not any answer thereto, and it was ended by arbitrament.

THORNBOROUGH
against
MONFENSON.

Weaver against Cardan.

CASE 12.

ACTION for these words: "Thou wert detected of perjury in the star-chamber."—It was held upon motion that the action lay not; for an honest man may be detected, but not convicted; so no slander. *Sed adjournatur.*

Words not
actionable.
B. R. H. 339.

Harleston's Case.

CASE 13.

IT was found before the coroner, *super visum corporis*, that Harleston fell into a marlepit *fortuito*, and so died. By the procurement of the queen's almoner, a commission issued out of the crown office, in nature of a *melius inquirendum*, and was awarded to the sheriff to enquire of his death, and of what goods and chattels he was possessed at the time of his death; and it was found before the sheriff, that he was *felo de se*, &c. It was moved, that this writ or commission was not well awarded, but utterly void; for the 28. Edw. 3. c. 9. is express, that no such commission shall be granted; and that the sheriff shall not take indictment by writ or commission; and *F. N. B.* 144. & 250. agreeth therewith.—But IVE, the clerk, informed that they have divers precedents since that statute of such commission awarded.

Melius inquirendum may be
awarded, notwithstanding
28. Edw. 3. c. 9.

3. Keb. 800.
1. Mod. 82.
3. Mod. 80.
100. 238.
12. Mod. 112.
496.
Carth. 72.
1. Vent. 181.
Salk. 190.
Strange, 69.
1. Bac. Ab. 436.

1073. 1097. 2. Hawk. P. C. 38. 109. 1. Bac. Ab. 436.

Collet against Marth.

CASE 14.

Trinity Term, 35. Eliz. Roll 38.

ERROR upon a judgment in a *præcipe quod reddat*. The error assigned was, Because the defendant was not summoned at the church-door, according to the 31. Eliz. c. 3. and by reason of his default a *grand capias* was awarded, and judgment given against him, and he lost his land by default, and in truth the sheriff returned him summoned at the church-door. It was thereupon demurred, whether he should have this averment, or should be put only to his action upon the case against the sheriff.—*Quære*; for THE COURT upon the motion doubted thereof. *Et adjournatur.* (a)

"Non summons" by the sheriff, in a *præcipe quod reddat* cannot be assigned for error.
Post. 397.
Moor, 349.
1. Roll. Abr. 621. 793.
Gouldf. 123.

(a) The judgment was affirmed, post. 397.

York against Allen.

CASE 15.

ATTAINT was brought in the common pleas of a verdict in *banco regine*; whereupon the record was removed, and there the verdict was affirmed; and now the plaintiff in the first action prays execution according to the first verdict, as 7. Ed. 6. *Dyer*, 81. is.—And POPHAM and the OTHER JUSTICES held, that he should have execution; for the Justices in the common pleas may not award execution, for they have but only *tenorem recordi*. But if the verdict had been disaffirmed, and execution on the first verdict had been had before, the Court of the common pleas might have awarded restitution very well, and afterward execution was awarded accordingly.

If verdict in C. B. be affirmed on attaint in B. R. the Court shall award execution on the first verdict.
1. Ro. Ab. 337.
3. Bac. Ab. 281.
1. Salk. 321.

CASE 16.

Watts against Hagden.

Pleading.

REPLEVIN. The defendant avows the taking in *White Acre* for *damage feasant*. The plaintiff replies, that they were taken in *Black Acre*, *ABSQUE HOC* that they were *damage feasant* in *White Acre*. It was thereupon demurred.—*ET PER CURIAM* without argument it was ruled to be an ill traverse; for he ought to have traversed the place of the taking, and not that they were *damage feasant*. Wherefore it was adjudged for the avowant.

CASE 17.

Dell against Higden.

Trinity Term, 36. Eliz. Roll 54.

Where, by custom, copyholds may be intailed, a recovery may be suffered in the lord's court to bar it.

Ante, 149.

Post, 380. 391.

1. Ro. Ab. 506.

Moor, 358. 753.

EJECTIONE FIRMÆ. Upon a special verdict the case was, Tenant in tail of a copyhold, remainder in fee, is impleaded by plaint in court baron in nature of a writ of entry in the *possi*, and suffers a common recovery with voucher: Whether this shall bind the remainder? was the question; the tenant in tail being dead without issue; and it was found, *quid nunquam antea videbatur talis recuperatio in curia manerii prædicti*.—THE COURT upon the motion seemed to incline that it should bind the remainder, but they spake not much thereto. *Sed adjournatur.*

4. Co. 23. a. Salk. 340. 1. Burr. 210. 1. Will. 26. Gilb. Ten. 176.

CASE 18.

Parlet and Bartholmew against Cray.

Michaelmas Term, 36. & 37. Eliz. Roll 25.

Fish in a pond shall go to the heir, and not to the executor.

1. Ro. Ab. 916.

Stanf. 25. b.

18 Edw. 4. pl. 8.

Co. Lit. 3. a.

22. Affise, 25.

18. Hen. 8. pl. 2.

1. Peere Will.

94.

TRESPASS. The case was, That a man having fishes in his pond, made his executors, and died. The defendant being his executor takes the fishes, and the plaintiff as heir brings trespass: and upon this matter disclosed by bar, it was demurred in law.—Adjudged without argument for the plaintiff. For although it be felony to steal fish out of a dam, or pond, or trunk, as *18. Edw. 4. pl. 8.* yet the owner dying, and leaving them in the pond, they are as profits of the freehold, which the executor shall not have, but the heir, or he who hath the water. Wherefore it was adjudged for the plaintiff.

CASE 19.

Leigh against Shaw.

Trinity Term, 36. Eliz. Roll 767.

If a man demise a rectory EXCEPTING the house, SAVING a chamber, to the lessee, the chamber passes by force of the lease.

1. Wood's Gen. 241.

EJECTIONE FIRMÆ of a chamber. The case was, That one let a rectory for years, *excepting* the mansion-house of the rectory, *saving* to the lessee the chamber now in question: and, Whether this shall be said to be let for years? was the question.—**POPHAM.** Here is an exception out of an exception, which is good enough, and shall make it pass by force of the lease; for this exception or saving makes the thing excepted as if it never had been let: so a saving out of a saving makes it as if it never had been excepted, and then it passed by force of the lease at first.—To this opinion without any argument the OTHER JUSTICES agreed. And it was adjudged for the plaintiff.

Stanton

Stanton against Barnes.

Hilary Term, 39. Eliz. Roll 492.

CASE 20.

UPON a special verdict it was found, that it was ancient copyhold land, parcel of the manor of *A.* and devisable in fee, or for life, *solummodo ea capienti extra manus domini*. It was moved, that the surrender was to the use of one for life, remainder in tail, remainder in fee, who were admitted accordingly by the tenant for life, who dieth; and, Whether that were good to him in the remainder in tail? was the question.—TANFIELD moved, that in regard the custom is soand expressly, that it shall be *solummodo ea capienti extra manus domini*, it ought to be an immediate taking; and he shall not take by way of remainder; also the custom will not warrant any estate but for life or in fee.—But THE COURT resolved to the contrary, that it is good enough. For in that it is limited to one and the heirs of his body, it is not void; but if it be not an estate tail, it is a conditional fee; and so it was agreed by us all in the case of *Granvener and Rake*; for when a custom warrants a greater, it shall warrant the lesser estate also. To the second, it may be well limited by way of remainder (as well as to the immediate taker; for when the custom warrants it, it cannot restrain a fee to be limited as well by way of remainder) as otherwise; and he in remainder and the particular tenant make but one estate, and in that it is found that the custom is, that it shall be granted *solummodo ea capienti*, it is void therein. Wherefore it was adjudged accordingly for the plaintiff.

By custom, a copyhold may be surrendered to the use of one for life with remainder in tail.

Ante, 307. 323
Post. 717. 907.

Co. Lit. 52. 60
1. Roll Ab. 511

Gilb. Ten. 194.
Carter, 22.

Moor, 173. 188.
1. Leon. 175.

Pop. 128.
1. Sid. 268.

Cro. Car. 45.
3. Lev. 327.

4. Mod. 86.
1. Salk. 189.

2. Atk. 101.
Burr, 206.

2. Ld. Ray. 995.

Noke against Awder.

Trinity Term, 36. Eliz. Roll

CASE 21.

COVENANT. Wherein he shews that one John King made a lease for years to *A.* the defendant, who by deed granted it to *Abel*, and covenanted with him, that he and his assignees should peaceably enjoy it without interruption. *Abel* grants it to *J. S.* who grants the term to the plaintiff, who being ousted by a stranger, brings this action; and after issue joined upon a collateral matter, and after verdict for the plaintiff, it was alledged in arrest of judgment, that this action lay not for the second assignee, unless he could shew the deed of the first covenant, and of the assignment, and of every mean assignment; for without deed none can be assignee to take advantage of any covenant, which cannot commence without deed; and to that purpose cited *Old Ass.* 102. and 19. *Edw.* 2. "Covenant," 25. And if one be infeoffed with warranty to him his heirs and assignees, and the feoffee makes a feoffment over without deed, the assignee shall not take advantage of this warranty, because he hath not any deed of assignment. But if he had the deed, it should be otherwise; and to that purpose vide 13. *Edw.* 3. "Fouch." 17. 3. *Edw.* 3. "Monstrans de Fayts" 37. 11. *Edw.* 4. *ibid.* 164. 15. *Edw.* 2. *ibid.* 44. 13. *Hen.* 7. 13. & 14. 22. *Ass. plea* 88.—But *POPHAM* held, that he shall have advantage without the deed of assignment; for there is a difference where a covenant is annexed to a thing, which of its nature cannot pass at the first without deed, and where not. For in the first case, the assignee ought to be in by deed, otherwise he shall not have advantage of the covenant; and therefore he denied the case of the feoffee with warranty; for the second feoffee shall have benefit of the warranty, although he doth not shew the deed

An assignee by estoppel cannot maintain an action of covenant.

Post. 436.

Moor, 419.
3. Co. 63. 2.

2. Vent. 61.
2. Ld. Raym.

1532.

NOTE
against
AWDER.

of assignment, but shews the deed of the warranty; and so is the better opinion of the books.—And to that opinion the OTHER JUSTICES inclined. *Sed adjournatur. Vide 3. Co. 63.*

It was adjudged for the defendant, post. 437.

CASE 22.

The entry of a lessor shall not excuse a lessee from performing a collateral covenant.

Ante, 362.

Moor, 402.

Carrel *against* Read.

COVENANT. Lessee for years covenants to drain such water out of land before such a day. He pleads, that before the day the lessor entered, and continued in possession until after the day: and it was thereupon demurred.—Adjudged to be no plea, because it is a collateral act to be done by him; unless he had said, that the lessor held him out, and disturbed him to do it.

Owen, 65. 3. Co. 92. a. 1. Roll. Abr. 453. 1. Bac. Abr. 434. 1. Wood's Con. 431.

Hilary Term.

37. Eliz. In the Common Pleas.

Sir Edmund Anderson, *Knt. Chief Justice,*

Thomas Walmsley, *Esq.*

Francis Beaumont, *Esq.*

Thomas Owen, *Esq.*

} *Justices.*

Sir Edward Coke, *Knt. Attorney General.*

Sir Thomas Fleming, *Knt. Solicitor General.*

CASE 1.

The under-tenant of a lessee of the crown cannot pray in aid of the crown.

Allen *against* Hollowell.

EJECTIONE FIRMÆ. The defendant pleads, that the queen was seised in fee, and let it to J. S. for years by patent, who let it to the defendant, and prays in aid of the queen.—And it was ruled to be no plea, because he is not immediate tenant. Wherefore a *respondes ouster* was awarded.

CASE 2.

A dyer's vat fastened to the wall of a house, is parcel of the freehold, and cannot be taken in execution under a *fi. fa.*

1. Roll. Ab. 891.

2. Roll. Ab. 556.

Co. Lit. 53.

Owen, 70.

Day *against* Bisbitch.

TRESPASS, for the taking and carrying away a dyer's vat. Upon a special verdict it was found that the sheriff, upon an action against the plaintiff, attached it, being fastened to the wall of the house, and delivered it to the defendant: and, Whether this taking or delivery were lawful or not? was the question.

FIRST, It was moved, that it could not be attached; because it is parcel of the freehold, and fixed thereto.

SECONDLY, That the action lies not against the defendant, because he hath it by the delivery of another, and not by his own taking.

And it was resolved by all THE COURT, that it could not be attached, in regard it is fixed to the land and wall.—ANDERSON said, that waincot fixed to a wall cannot be removed; and if it be, it

it is waste. So of tables dormant, fixed, &c.—WALMSLEY said, that in the time of *Lord Dyer*, this difference was here taken, and agreed, that a furnace fixed *in medio domus* is but a chattel, and is removeable; but otherwise it is, being fixed to the walls: and afterwards it was adjudged accordingly for the plaintiff.—The second matter was not much insisted upon, because he was present and took it, and so he was an immediate trespasser. *Vide* 42. *Edw.* 3. pl. 6. 20. *Hen.* 7. pl. 13. 21. *Hen.* 2. pl. 6.

DAY
against
BISBITCH.

Brawn against Michael.

CASE 3.

ACTION for words. Whereas he was a justice of the peace that the defendant spake of him these words: "He hath delivered untruths upon his oath, in his answer in the chancery, at the suit of *J. S.*" It was thereupon demurred; and without privity of the Court, in *Mich.* 36. & 37. *Eliz.* judgment was entered for the plaintiff. It was now moved to stay the writ of enquiry of damages to be awarded.—And all THE COURT agreed thereto, for judgment was entered without their privity; for they all now agreed, that an action lies not for these words. For he might deliver untruths upon his oath in his answer, and not be perjured; for there are therein two oaths, the one upon his knowledge, the other upon his evidence, upon report of others, which may be untrue, and he not be perjured. Wherefore, &c.

Words not
actionable.

Sharrock against Hannemer.

CASE 4.

FALSE IMPRISONMENT. The defendant justifies, for that he was high-constable of the hundred of *D.* in the county of *Salop*, and that the plaintiff made an affray upon *J. S.* and that he came presently after the affray made, and *J. S.* prayed him that he would take sureties of the peace, because he stood in fear of his life: whereupon he committed the plaintiff to ward there, (for that he would not find sureties for the peace), as it was lawful for him to do; and traverseth the imprisonment in any other county: and it was thereupon demurred.—FIRST, Because a constable cannot take sureties of the peace, unless for an affray committed in his view.—SECONDLY, Because the county is not traversable.—But as to the second, THE COURT would not hear any argument; for there is no question but it is traversable when the justification is local; and so it was adjudged in the queen's bench, 27. *Eliz.* Roll 404. betwixt *Dawby* and *Dawby*.—But as to the first, ANDERSON, WALMSLEY, and BEAUMOND held, that the justification is not good. For ANDERSON said, that a constable may commit one for the breach of the peace in his view, but not if it be done out of his sight; and he cannot take an obligation for the breach of the peace, if it be not broken in his view; and an high-constable is not such an officer, nor conservator of the peace, whereof the common law takes any notice, for he is not mentioned in any book; and neither the high nor petit constable can take any man's oath, that he is in fear of his life: wherefore, &c.—WALMSLEY. A petit-constable may commit one who hath broken the peace, although it were out of his sight, if he will not find sureties of the peace, upon information that one intends to make

A constable cannot arrest for an affray out of his view without warrant, except felony is likely to ensue. Ante, 168. 204. Lamb. 132. Bro. Surety, 23. 36. Moor, 284. Savil, 97. Owen, 105. 1. Hawk. 269. 2. Hawk. 97. 1. Bac. Abr. 441. 2. Ld. Raym. 1195. Dougl. 359. 671.

SHARROCK
against
HANNEMER.

a battery, and to disturb the peace; for by preventing of the occasion of the breach of the peace, it shall be well preserved. And although that 10. *Edw.* 4. 22. *Edw.* 4. *pl.* 25. 3. *Hen.* 4. *pl.* 9. are, that he may commit one upon view of the breach of the peace, and make him find surety therefore; yet 44. *Edw.* 3. title "*Barr.*" is, that he may do it upon information of the peace broken, or to be broken, or that he comes where the persons are assembled to break it; for thereby the breach shall be avoided: but he may not take sureties by recognizance entered, because he is not a judge, nor any officer of record, but is elected by matter *in pais*, and therefore may take surety by matter *in fait*, viz. the obligation. But an high-constable cannot do so; for he is not a conservator of the peace by any law, nor find I any authority which mentions him; and in the north there are not any high-constables. But neither high nor petit constable can take an oath of any one, that he is in fear of his life: wherefore, &c.—BEAUMOND. A constable and sheriff are conservators of the peace at the common law, and may take surety of the peace by obligation, upon view of the peace broken or tumult made; otherwise not. But they cannot take any man's oath that he is afraid of death; for he is not a judge, nor officer of record; which is the reason that an obligation taken by him shall be in his own name, and not in the queen's name; and shall be certified at the sessions of peace. But a chief-constable cannot do so; nor are they by the common law, but by custom, and for conformity: wherefore, &c.—OWEN. A constable is a conservator of the peace by the common law, and may take sureties of the peace, as well before the peace broken as after, for otherwise it would be too late; and this authority at the common law yet remains, and that a chief-constable may also do it.—But notwithstanding his opinion, for the reasons before expressed, it was adjudged for the plaintiff.

CASE 5.

Mercer against Charter.

Easter Term, 33. Eliz. Roll 1618.

Qu. In what
manner an im-
perfect special
verdict in attain-
t shall be reme-
died?

Ante, 309.

Post. 645, 646.

F. N. B. 108. D.

Co. Lit. 139. a.

3. Bl. Com. 402.

ATTAIN upon a verdict in an assise.—A special verdict was found which was imperfect in divers points, and how it should be remedied was much doubted; for they all resolved he could not have a certificate, although a certificate lies in the first action. A new *venire facias* also lies not; because no *venire facias* lies in the action, but it was a jury the first day. But as they were now advised, they conceived that he should have a new summons of the jurors in the action. ANDERSON and BEAUMOND held, that he might discontinue this action, and bring a new attain. But WALMSLEY and OWEN conceived, that after a discontinuance by act of the party, he shall not have a new attain; neither by the common law, nor at this day by the 23. *Hen.* 8. c. 3. but that he shall be fined and ransomed. But they all resolved, that after a nonsuit, he shall not have a new attain, neither by the common law nor by the said statute. *Et adjournatur.*

Baldwin

Baldwin against Wiseman.

Trinity Term, 36. Eliz. Roll 906.

CASE 6.

TRESPASS. Upon a special verdict it was found, that *Richard Baldwin* had issue *Richard* and *Henry*, and two daughters; and devised his land to *Henry* in tail, if he lived unto his age of twenty-four years, upon condition that he should pay 100l. to his daughters; and if *Henry* died without heir, then if *Richard* did not pay the said 100l. that it should remain to his daughters and their heirs. Whether this were a condition, or a remainder by limitation to the daughters? was the question.—**WALMSLEY** and **BEAUMOND** held, that it was a condition: and **BEAUMOND** said, that a devise to *J. S.* paying 100l. to *J. D.* and if he fail, that it shall remain to *J. D.* is a void remainder; so a devise to *A.* and his heirs, and if he die without heir, that it shall remain to *B.* is a void remainder. But **OWEN** è contra in the principal case; for it is a limitation by reason of the intent.—But being afterwards moved again, it was adjudged according to the opinion of **WALMSLEY** ut supra, that it is not any limitation, but a condition; and that *Richard* was in for the condition broken (a).

A devise to *A.* in tail, "upon condition that he pay 100l. to *B.*; and if *A.* dies without heir, then if *C.* do not pay the 100l. the land should remain to *B.*" This is a condition, and not a limitation.
Ante, 205.
1. Roll. Ab. 411.
Goldf. 152.
Cowp. 841.
Doug. 63. 75. 689.

(a) This judgment was reversed upon a writ of error in the queen's bench, East. and not a condition. **OWEN**, 112. See also 37. Eliz. and it was agreed by **GAWDY**, **DYER**, 128. **PLOWD.** 408.

Elizabeth Countess of Rutland against Isabel Countess of Rutland.

CASE 7.

ELIZABETH countess of Rutland, and other executors of **EDWARD** earl of Rutland, executor of *John* earl of Rutland, against **ISABEL** countess of Rutland. Action upon the case of trover of divers jewels and other goods to the value of 1000l. and alledged, that the defendant knowing those goods to appertain to **JOHN** earl of Rutland in his life-time, and after his death to **EDWARD** earl of Rutland, as executor to **JOHN**, and after his death to the plaintiff, as executor to **EDWARD**, executor to *John*, had converted them to their damage of 1000l. The defendant pleaded not guilty; and found guilty to the damage of 940l.

Trover lies by an executor upon a conversion in the time of the testator, although the goods have never been in the actual possession of the executor; and the time of the conversion is not traversable, and need not be alledged in the declaration.
Post. 384. 387.

It was now moved in arrest of judgment, that this action lies not for an executor upon a trover and conversion in the time of their testator; for it is not within the 4. Edw. 3. c. 7. as a *quare impedit* and an *ejectione firmæ* have been taken to be within the equity thereof.

1. Roll. Ab. 288.
Owen, 156.
Moor, 256.
2. Roll. Ab. 554.
Lut. 167. 214.
2. Mod. 163.
Sav. 118. 133.
Pop. 189.
1. Leon. 193.
Hob. 10.
Vent. 309.

Secondly, Because there is not any certain time shewn of the conversion, whether it were in the time of the testator or of the executor.

YELVERTON to the first exception. The action well lies for an executor by the equity of the statute. And so it was adjudged Pasch. 33. Eliz. B. R. that this action lies for executors upon a trover and conversion in the time of their testator; and it was one *Drake's Case*.—To the second, the day of the conversion is not material; for be it in the time of the one or the other, the executor shall recover and have damages to the use of their testator. But the count is certain enough; for it is, "that the defendant knowing the goods to be the goods of the said *John* earl of Rutland, and intending to defraud the plaintiffs, had converted them;"

RUTLAND
against
RUTLAND.

so of necessity it is to be intended, that the conversion was in the plaintiff's time.

As to the first, all THE JUSTICES resolved, that an executor may well maintain an action for goods converted in the time of their testator, by the equity of the 4. *Edw. 3. c. 7.* as well as a *quare impedit*; and so is the common experience at this day.

Ante, 97.

But as to the second, BEAUMOND and OWEN held it to be a material exception; for the day of the conversion ought to be expressly laid, although it is not traversable: for it is matter of substance, and the point of the action; and therefore the day and place of the conversion ought to be expressly mentioned. And it hath been adjudged in the queen's bench in *Stranfbam's Case*, and in *Sir Thomas Pylliston's Case*, that the place of the conversion ought to be laid; otherwise it is ill: and as this case is, the action may be brought of the conversion in the time of the testator, or in his own time: and it is doubtful in whose right it is brought, for want of the time certainly expressed: and in the one case he ought to have his action upon the statute; and in the other case, by the common law: wherefore it is not good.

3. Rol. 485.

But ANDERSON and WALMSLEY held strongly to the contrary: for the case being agreed, that the executors shall have the action as well for the conversion in the time of their testator as in their own time, it is not material in whose right the action is brought; for they are to recover damages to the use of their testator both ways. And it is agreed on all sides, that the day laid down is not traversable: and not being expressed, it is not much material; nor the inquest shall not have regard thereto: but the time is well laid down; for it is *post mortem*, intending to defraud: so of necessity it is to be intended, that the conversion was *post mortem*. And as to the cases cited, that the place of the conversion is material in this action, that is, because otherwise there cannot be any trial, if no place had been alledged; but as this case is, being after verdict, it is not any exception to stay the judgment; although peradventure it might have been an exception, if there had been a demurrer thereupon; for that is not in default of substance, but it is to the manner only.—Afterwards, in this Term, the record of the case of *Russel and Pratt*, which was Hilary, 21. Eliz. Roll 410. in banco *reginae*, was brought in and shewn; and in that it was proved, that an action lies for an executor for a conversion in the time of his testator; but nothing proved for the day. And it was said by ANDERSON, that the Lord Chief Justice and Chief Baron were of this opinion. But further day was given till the next Term; and if any of the parties died, judgment should be *tunc pro nunc*.—And afterward, the next Term, it was adjudged accordingly for the plaintiff.

Several execu-
tors may sue by
attorney, tho'
some of them
are within age.

1. Roll. Ab. 288.

1. Sid. 449.

2. Mod. 248.

NOTA. That in this case it was resolved, that three executors bringing this action, and the one being an infant, and they all sued by attorney, that it was good; because they all are but one person, and sue *in autre droit*, and not in their own right; and it is not reasonable that one or two should sue by attorney, and a third by guardian or *prochein amy*.

Sed vide 2. Saund, 213. 1. Vent. 102. 1. Mod. 296. 1. Lev. 299. *contra*.

Walker

Walker against Collier.

CASE 8.

Hilary Term, 36. Eliz. Roll 906. or 306.

TRESPASS. Upon a special verdict the case was, The land was devised to one for life, remainder to the plaintiff, *paying* five and forty shillings to John S. and it was found, that the land was worth three pounds *per annum*. The tenant for life died; and, Whether the plaintiff had thereby a fee, or for life? was the question.—And all THE COURT resolved, without any great argument, that he should have it in fee, especially when the money is not appointed to be annually paid. And ANDERSON said, that this word “*paying*” made his estate conditional: but the not finding whether it was paid is not material; no more is the finding of the value. Wherefore it was adjudged *ut supra* for the plaintiff.

A devise to one for life, remainder to another, *paying* a certain sum to a third person; the remainder-man shall take a fee conditional.

Ante, 106. 205. Post, 498. 745.

5. Co. 21.

6. Co. 16. a.

106. 564. 687.

Cro. Car. 158. 416. Cro. Jac. 527. 2. Mod. 25. Salk. 685. Cowp. 835. 2. Vern. 106. 564. 687. Gilb. Dev. 21, 22. Cowp. 842.

Chomley against Humble.

CASE 9.

Hilary Term, 35. Eliz. Roll 2018.

TRESPASS. Upon demurrer the case was, A feoffment was made to the use of one for life, remainder to Henry Chomley in tail, remainder to another in tail, remainder over in fee to the lord chamberlain, Lord Hunsdon, with this *proviso*, “That if any of them in remainder in tail go about to levy a fine, or to do any act, whereby the uses limited shall not take effect according to the limitation, or that there shall be any discontinuance; that then the estate of him who so goeth about shall cease, as if he were naturally dead, and no otherwise.” And, Whether this were a good *proviso*, and that the estate shall cease by such an act done? was the question.

A feoffment to one for life, with remainders over in tail, *proviso* that if any of them in remainder in tail shall alien, the uses shall cease in respect to him, as if he were dead. This *proviso* is repugnant, impossible, and against law.

1. Co. 84.

1. And. 346.

2. And. 134.

Hob. 170.

Cro. Jac. 696.

698.

2. And. 143.

149.

6. Co. 43. a.

10. Co. 42. b.

Winch 56.

1. And. 346.

Moor, 593. 601.

633.

1. Bac. Abr.

411, 412.

4. Bac. Abr.

324.

Dougl. 755.

(a) Ante, 361.

6. Co. 40. b.

Raym. 355.

13. Co. 64.

Dy. 351. b.

After argument by the *Serjeants* on either side, THE COURT delivered their opinion, that it was not good.

ANDERSON. At the common law *cestuy que use* had nothing; and an estate of inheritance at the common law cannot cease; and the statute of uses doth not help it: for the statute cannot help any use, where there is not any person who is seised to the use.

WALMSLEY. The *proviso*, that it shall cease, as if he were naturally dead, is void, and without sense; for if he were dead, it should descend to the son, and he should be in, in the *per*, by the father, and it should come unto him *quasi* by degrees and steps; but that cannot be when the father is *in esse* and living: wherefore the words in the *proviso* to this purpose are void, and without any signification, and they are as if they never had been mentioned; and so it is an estate tail absolute and without condition: but in entry into religion, the land shall descend to the son; for the law reputes him dead. But if an act of parliament had been made *ut supra*, it should be good enough, and should make a discent to the son without death; but by conveyance there cannot any such discent be made (a): and an estate of inheritance in land cannot be made to cease by any conveyance, without some other act doing.—BEAUMOND *ad idem*. An estate in tail cannot cease at the common law, no more can it in use at this day; for it is as an estate executed at the common law; and the issue cannot have a *formedon*, living the father; and that feoffees at this day should be seised to his use is absurd. Wherefore, &c. *See*

adjournatur,

CROMLEY
against
HUMBLE

adjournatur, and not adjudged at that time.—But afterwards in the next Term adjudged, that the *proviso* was not good (*b*), and that the issue could not have it for the forfeiture. 1. Co. 86.

(*b*) Moor, 592. 1. Co. 138. b. Co. Lit. 27. a. 6. Co. 41. b. 8. Co. 17. a.

CASE 10.

Dyotto against Curredale.

In account
against a re-
ceiver, the place
where he re-
ceived is not
local, but tran-
sitORY, and
therefore not
traversable.
Ante, 168. 184.
Post. 667. 705.
842.
3. Comp. Dig. 117.

ACCOMPT. Supposing that he was his receiver at *London* to render accompt. The defendant saith, that he received it at *Litchfield* to deliver over to *J. S.* which he had delivered, **ABSQUE** **HOC** that he was his receiver at *London*.—And it was thereupon demurred; and without argument adjudged for the plaintiff: for the place of the receipt is not traversable; for the receipt is not local but transitory, which matter may be given in evidence in any place. But if the traverse had been, **ABSQUE** **HOC** that he received it in another manner, it had been well enough. Wherefore it was adjudged *ut supra*.

CASE 11.

Howlet against Osbourn.

An *assumpsit*
will not lie upon
a promise to pay
over money re-
ceived from a
third person,
unless a day of
payment be
given. *Quere.*

ASSUMPSIT. The case was, That one delivered ten pounds to the defendant to deliver to the plaintiff; and the defendant promised the plaintiff to pay it unto him. Upon this the plaintiff brought his action.—And ruled, that it lies not. But **WALMSLEY** said, if the plaintiff had given a day before the payment thereof, it had been a good consideration.

Cowp. 290. Dougl. 23.

CASE 12.

Eylet against Lane and Pers.

A recovery in
the lord's court
against a tenant
in tail copyholder
is a discontinu-
ance; and
quere if it is
not a bar.
Ante, 372.
Post. 391.

TRESPASS. It was found by special verdict, that the land was demisable in fee, or in tail by the custom; and that this land was demised in tail by copy, and that the copyholder suffered a recovery in a writ of entry in the *posse*, with voucher over; and that such recoveries were not used there before: and, Whether this should bind the estate tail or no? was the question.—And **THE COURT** upon motion thereof conceived, that it should be hard to warrant such recoveries, unless there be a special custom to maintain it; and it is hard to maintain it; for a warranty cannot be annexed to such an estate. *Quere.*—But afterwards it was adjudged, that this recovery being against the tenant in tail himself, was at the least a discontinuance, as it is of a recovery against tenant in tail in possession at the common law: but, Whether it were a bar to the intail or not? they agreed not in opinion. But for the cause of the discontinuance, judgment was given for the defendant.

1. Roll. Ab. 506.
2. Com. Dig.
528.
Gilb. Ten. 176.
189.
1. Bac. Ab. 46c.
1. Wils. 26.

CASE 13.

Price against Williams.

If the grantee
of an annuity
die before the
money becomes
due, the pay-
ment is dis-
charged.

DEBT as executor to *Lady Price* upon an obligation. The condition was for the payment annually of forty pounds during the life of the lady at the feast of *Saint Michael* and the *Annunciation*, or within thirty days after every of the said feasts. The lady dies within the thirty days: Whether this shall discharge the payment due at the said feast before her death?—And **THE COURT** held that it did (*a*).

30. Co. 12. 79. b. 1. Lev. 54. Dougl. 519. Cowp. 540. 2. Term Rep. 366. 1. Peer. Will. 179.

(*a*) Vide 11. Geo. 2. c. 19. s. 15. as to the recovery of rents from under-tenants where tenants for life die before the rent is payable.

Percy against Bardolf.

CASE 2.

Hilary Term, 37. Eliz.—In the Exchequer Chamber.

ERROR upon a judgment given in the queen's bench. Debt was brought against *baron and feme*, for the debt of the *feme*, upon an obligation made by the *feme dum sola fuit*. Upon *non est factum* pleaded, and found for the plaintiff, judgment was, that the *baron* shall be in *miseriordia*, and that the *feme capiatur*.—And this being assigned for error, the judgment was reversed; for it should be *capiantur* for both. 34. Hen. 6. pl. 23. 15. Edw. 4. pl. 2. 3. Edw. 4. pl. 24. 4. Edw. 4. pl. 25. 1. Hen. 7. pl. 25. 9. Hen. 6. pl. 9.

A *capiatur* shall be entered against the husband for the debt of his wife.

Moor, 704.
Cro. Jac. 203.
440.
1. Ro. Ab. 221.
Cro. Car. 407.
Wilfon, 149.

9. Co. 72.—Sed vide Cro. Car. 513. Hob. 98. 101. *contra*. See Stra. 1167. 1237.
1. Term Rep. 486.

Easter

Easter Term,

37. Eliz. In the Queen's Bench.

Sir John Popham, *Knt. Chief Justice.*Sir Francis Gawdy, *Knt.*John Clench, *Esq.*Edward Fenner, *Esq.* } *Justices.*Sir Edward Coke, *Knt. Attorney General.*Sir Thomas Fleming, *Knt. Solicitor General.*

CASE 1.

Dudley against Kington.

Evidence that a person occupied an office by reputation, is proof that he had the office.

Moor, 401.

Cowp. 66. 502.

1. Term Rep. 361.

DEBT upon an obligation. The condition was, that if the plaintiff had possessed and enjoyed the office of beadle of the court of conscience in London, that then, &c. The defendant pleaded, *quod habuit, gavisus fuit et occupavit, &c.* whereupon they were at issue. And the jury found, that the plaintiff did exercise and occupy that office from the time of the bond made until that time; but whether it were an office *de jure* they knew not. *Et si super totam materiam videtur Curia*, that THAT should be said to be an having, possessing and enjoying of the office, they found for the defendant; otherwise for the plaintiff.—And HARRIS *serjeant* hereupon moved, that this verdict is for the plaintiff; for this occupying of the office cannot be said to be an *having* and *enjoying* thereof; for a deputy may exercise an office, yet he hath not any office; as 39. *Hen. 6. is.*—And to that opinion GAWDY inclined; for it ought to be an *having in interest*, and not only an occupation which shall make a performance of the condition.—But POPHAM, FENNER, and CLENCH, *é contra*. For FENNER said, there was a diversity betwixt an office in verity, and an office in reputation only: for an office in reputation which is not *revera*, one cannot have any other possession than by the occupation thereof; and the occupying thereof is all the enjoying which may be of it; for it is not an office in interest, but only in the name and use thereof; and therefore there cannot be any interest thereof but by the using it; as to have the office of marshal or tryor before the Justices of assise, or the like. Wherefore, &c.—And afterwards judgment was given accordingly for the defendant.

CASE 2.

Girland against Sharp.

A use cannot be limited upon a use.

See Note (1),

Co. Lit. 271. b.

TRESPASS. Upon demurrer the case was, That one infeoffed his two sons to the use of himself for life, and after to the use of them and their heirs, *ad ultimam voluntatem suam perimplendam*; and afterwards devised it to Sharp, the defendant, in fee: and, Whether Sharp hereby shall have the land, or not? was the question.—GAWDY conceived, that he should not; for an use cannot be limited upon an use; then when he limits it to the use of his two sons and their heirs, he cannot afterwards limit it to the uses of his last will. But the words, *ad performandum ultimam voluntatem*, as

to

to limit any uses thereby, are void words. And to that opinion CLENCH agreed; but FENNER doubted thereof. Wherefore it was adjourned.

GIRLAND
against
SHARP.

CASE 3.

Thinn against Chomley.

Trinity Term, 36. Eliz. Roll 842.

DEBT. And declares, that he let certain land to Agar for one- If a tenant who and-twenty years, rendering annually at the Temple Church, is chargeable London, thirty pounds at Michaelmas and the Annunciation. Et si with the rent contingat that the said rent should be behind, and not paid at the assign over his days, &c. that then the said Agar, his executors and assigns, interest in the land, the assignee should forfeit nomine pene three shillings and four-pence for every is chargeable day which should incur after such default, until the said rent and with the penalty arrearages should be paid. That afterward, upon 28. February, for arrears 32. Eliz. the said Agar granted his estate to the defendant; and that incurred in his after the grant at Michaelmas, anno 33. Eliz. the rent was arrear, own time. and not paid; and it was in arrear for five hundred seventy-six Gould. 129. days after. And that at another rent day it was in arrear, and not 136. paid, and remained in arrear for twelve days. Wherefore he had Moor, 357. forfeited, &c. Whereupon he demanded three hundred pounds Hob. 82. sixteen shillings and eight pence. The defendant thereupon pleaded Dougl. 643. 636. 764. nil debet; and it was found against him.

It was now moved in arrest of judgment, that this action lies not against the assignee; for this penalty is merely founded upon the contract, which is in privity betwixt the lessor and the lessee; and it runs not with the land.

But GAWDY and CLENCH held that it well lay; for the land is charged therewith; and the assignee for his own time shall be chargeable. But FENNER held *è contra*; for the penalty is *quasi* collateral.

FENNER also moved, that the declaration was not good; for he is not entitled to the penalty, unless the rent be demanded, no more than he should be to the forfeiture of a lease for non-payment.

GAWDY. It is not alike; for the condition which goes in defeasance of an estate shall be taken strictly; but the penalty is in nature of the rent: and as he shall have the rent itself without demand, so he shall have the penalty. And to that opinion CLENCH agreed, POPHAM *absente*. Wherefore it was adjourned.

Co. 70. 28. b.

Goodale against Wyer.

CASE 4.

Hilary Term, 37. Eliz. Roll 805.

EJECTIONE FIRMÆ for lands in Aylesbury. Upon a special A condition to verdict the case was, That Sir John Packington, by deed indented, pay the heirs, infeofed of those lands one Woodliff, upon condition, that if he paid &c. of the to the heirs, executors, or administrators of Woodliff one hundred scoffee, is marks within a year after his death, that then *charta prædicta et performed by a seisina superinde deliberata foret vacua et nullius effectus*. Woodliff *bona fide* payment to the infeofs J. S. thereof, and dies; and within a year after his death heir, although the scoffee has made a scoff- Sir John Packington agrees with the heir of Woodliff for thirty and ment over; but a covinous pay- two pounds to be paid in satisfaction of the hundred marks. Ne- ment shall not vertheless at the day he paid unto him the one hundred marks, upon defeat the estate of the second scoffee. the two and thirty pounds. And hereupon Sir John Packington Ante, 67. entered upon J. S. who entered and let it to the plaintiff.

POP.

GOODALE
against
WYET.

Co. Lit. 95. 209.

Moor, 708.

5. Co. 95.

1. Ro. Ab. 408.

Gouldf. 177.

Poph. 99.

Godb. 299.

1. Wood's Con.

273. 283. 290.

299. 362.

Shep. Touch.

140.

POPHAM. Although the one hundred marks were entirely paid, and so the condition was performed in words, yet circumstance will make it to be no payment nor performance in law; for payments ought to be plain and true: but here there is not any true payment of more than thirty and two pounds; for of the residue there was not any payment; for he that paid it may thereof have an account against him who received it: and it is as no payment, but *quasi* a receipt to render an accompt. And to that opinion GAWDY seemed to agree.

GAWDY also held, that the money ought to have been paid here to the assignee; for he is the party who is to have the loss; and therefore he ought to have the payment. And although he be not named it is not material: and for that purpose *vide* 6. Rich. 2. "*Quid* "*Juris clamat.*"—Wherefore they advised the jury to find this matter specially; and so they did. *Queretamen decco, Perkins*, 148. And after argument it was adjudged accordingly for the plaintiff, for the reason before specified.—NOTE, That afterwards a writ of error was brought upon this judgment, and the error was assigned in point of law: and affirmed that they were good words of a condition; and that this payment being covinous, was no performance. 5. Co. 95. b.

CASE 5.

To trespass for chasing cattle
ita quod it died,
a justification of
the chasing with-
out answering
the death is bad.
Ante, 30. 94.

See 1. Lev. 283.
Saik. 459. where
this is denied to
be law.

CASE 6.

Words,
Moor, 401.
Ante, 67.
Post. 470.

CASE 7.

An administra-
tor may main-
tain an action
for trespass in
the life-time of
the intestate.
Ante, 377.

CASE 8.

A grant of a
walk in a forest,
"PROVIDED,
" and the said A. B. (the grantee) doth covenant not to fell or cut any wood but for necessary browse"—the heir of the grantee cuts down four oaks—this is no forfeiture; for the proviso is a condition and not a covenant. Post. 560. Moor, 706. 2. And. 20. 2. Co. 71. b. Poph. 116. Gould, 130.

Hill against Prideaux.

TRESPASS. For that he chased his cattle *in tantum ita quod per effugationem interierunt*. The defendant pleads, that the place where, &c. is holden of him by such services; and he distrained those beasts, and impounded them in a pound overt; and that they died there *de fame* in default of the plaintiff, the which is the same trespass: and it was thereupon demurred.—And without argument adjudged for the plaintiff; for when the plaintiff alledged, that *in tantum effugavit quod per effugationem interierunt*, and he pleads, *quod fame interierunt*, that is not any plea without a traverse, *quod per effugationem non interierunt*.

Jenkinson against Mayne.

ACTION for these words: "The plaintiff deserved to have his ears nailed to the pillory."—Adjudged that the action lies.

Smith against Vanger Colgay.

TRESPASS by an administrator *de bonis asportatis in vita intestati*. After verdict it was moved in arrest of judgment, that this action is not given by the 4. Edw. 3. c. 7.—But ruled without argument, that the action lay by the equity of the statute; for it is in equal mischief. 14. Hen. 7. pl. 13. "*Accord.*"

Earl of Pembroke against Sir Henry Berkley.

Easter Term, 36. Eliz. Roll 351.

ACTION upon the case, for disturbing him to execute his office. Upon demurrer the case was, That the Earl of Pembroke was seised in fee of the manor of Froomswood, in the county

PENBROKE
against
BERKLEY.

5. Co. 76.
9. Co. 50.
1. And. 29.
Pop. 117.
Moor, 707.
2. Mod. 121.

of *Somerſet*, with the cuſtody of the foreſt of *Fromeſwood* thereto appertaining (the foreſt being the queen's), he granted by indenture to *Sir Maurice Berkley*, father to the defendant, and to the heirs males of his body, the office of the lieutenantſhip of the foreſt, and the cuſtody of a walk within the ſaid foreſt called *Stavordale Walk*, with all fees thereto appertaining: "PROVIDED, and "the ſaid *Maurice Berkley* doth covenant, promiſe, and grant for "him, his heirs, &c. that the ſaid earl, &c. ſhall have the command of the game there. PROVIDED alſo, and the ſaid *Maurice Berkley* doth further covenant, not to fell or cut any wood, "but for neceſſary browſe." *Sir Maurice Berkley* dies, and afterwards *Sir Henry Berkley* being his heir, enters and cuts down four oaks, whereupon the earl claimed it for the condition broken: and, Whether it were a condition or but a covenant, and whether it were broken, and if the eſtate of *Sir Henry Berkley* by this act done, be determined and forfeited? were the queſtions.

TANFIELD and ATKINSON argued that it was but a covenant, and not a condition; for the words are all the words of the leſſee, and there is not any reſtraint impoſed by the leſſor; and being conjoined by the leſſee with the covenant, are only of the nature of a covenant, and not conditional. But if it had been, "PROVIDED always, and it is covenanted, &c." there peradventure it might have been a condition; for they are the words as well of the leſſor as of the leſſee; and in proof thereof relied upon 28. *Hen. 8. pl. 6. & 13. 3. & 4. Phil. & Mar. 150. Gravenor's Caſe, 5. Eliz. 222. & 318.* That the word PROVISIO being coupled with a covenant, and being ſpoken by the leſſee only, do not amount to a condition, but to a covenant only. But *Pafch. 33. Eliz. Rot. 709.* in the common pleas, betwixt *Symſon* and *Totterell*, where a PROVISIO was, "And it is covenanted and granted that the leſſee "ſhall not aſſign his term," it was adjudged to be a condition, for the reaſons before; and here are not any words which ſhew the intent of the parties to make the eſtate conditional; but rather *contra*. For the firſt clearly is not any condition, but a covenant only. And of the ſame nature is the ſecond, for that is, "provided alſo, &c." which is in the ſame manner; and although the words in the indenture are *quafi* the words of both, yet they are properly the words of him who ſpeaks them.

Ante, 202.

Ante, 242.

COKE, the *Queen's Attorney*, and WILLIAMS, *ſerjeant*, *2 contra*. For this PROVISIO ſounds as a condition, becauſe it ſtands *ſubſtantive*; and it is to reſtrain the doing of a thing; and it is alſo a covenant of the breach whereof damages ſhall be recovered. But admit it were not a condition, yet the cutting down of the trees was a forfeiture of his office, by a condition in law annexed thereto, whereof the earl ſhall take advantage, and not the queen, as 39. *Hen. 6. is.*

GAWDY. This *proviſo* here is not any condition; for a *proviſo* of itſelf in a deed which hath not any perfect ſentence annexed thereto, is neither a condition nor a covenant. For the concluſion thereof ſhews how it ſhould be taken, but this is matched here with the words of a covenant; ſo that the words which make it to have any perfect ſenſe reſt only in covenant; for, if it ſhould be taken by itſelf, it hath not any meaning, and then it cannot make it a condition;

PEMBROKE
against
BIRKLEY.

Ante, 202.
Post, 486.

Co. Lit. 233. b.

tion: the words also spoken by the lessee only, shall never make a condition. And to that opinion CLENCH agreed.

POPHAM and FENNER *contra*; for the *proviso* here hath a perfect conclusion. For the words that the lessee shall not fell trees, refer to the *proviso* and to the covenant; so it sounds as well to the condition as to the covenant; and it shall be as if there had been several sentences; and there is not any difference betwixt this and the case of *Symson v. Tetterell* before recited. POPHAM said, that if these were not here a condition *in fact*, the defendant had forfeited his estate by a condition in law annexed thereto; and that forfeiture is to the plaintiff. For it is a condition annexed, that he shall preserve the game; and when he destroys that which is for the preservation of them, he thereby breaks the condition in law; and although the *woodward* may by his office cut down trees and not be punished, yet the laws shall punish a *keeper* who offends therein. And as to that which hath been said, that if it be a forfeiture, it shall be to the queen of the entire office, that is not so; for there is a difference when a man hath an office, and grants the entire office to another for life, and the grantee breaks a condition in law, the entire office is forfeited. But if a man hath another inferior office derived out of his office, but not any part of the principal office, but appertaining thereto, and in his gift, the forfeiture of the inferior office is given to the grantor, and it shall not be a forfeiture of both offices; which is the reason of the case 39. *Hen. 6.* of the case of the duke of *Norfolk*.

GAWDY. I do not remember any book, that the cutting down of trees is the forfeiture of the office of a parker; for the condition annexed to his office is but to preserve the deer; and therefore 5. *Edw. 4.* if a stranger kills the deer, it is a forfeiture of his office. But clearly it is not so if the stranger cut down the trees: and as this case is, it doth not appear to be any forfeiture; for although the defendant hath cut down four trees, yet it appears not but that there is sufficient left for browse and shade for the deer, and for covert for them. Wherefore, &c. *Adjournatur*.—Afterwards, upon conference amongst all THE JUSTICES of *England*, it was held by the greater part of them to be a condition, and adjudged accordingly (a).

(a) Vide post, 560, where a writ of error was brought, and the Judges would not suffer it to be again argued that it was not a condition.—See also 2. Co. 71.

CASE 9.

Leases for years
will not pass by
A GRANT of
omnia bona, but
they will pass by
such words in a
WILL.

S. C. Gould.

320.

S. C. Moor, 352.

Yelv. 68.

Dyer, 5.

2 Roll. Abr.

58. 732.

5. Co. 109.

Co. Lit. 118. b.

1. Leon. 193.

Portman against Willis.

EJECTIONE FIRMÆ. Upon a special verdict it was found, that the bishop of *Winchester*, 26. *Hen. 8.* let the land to *Robert Hill* for 99 years. That *Robert Hill* 1554, being possessed of that lease, made his will, and thereby devised divers legacies of plate and other goods to others; and afterwards therein devised "all the residue my goods, my debts and legacies paid unto *Margaret* my wife, whom I make my sole executrix, to see my will performed; and I make *Henry Portman* my overseer." *Robert* dies; the *feme* enters generally, and deviseth that term to *James Hill*; and dieth before the debts paid. *James* enters by the executor's assent, and was a suitor to the bishop of *Winchester*, that he might surrender it to the use of *Symms* and his heirs, who, agreed thereto. Afterwards *James Hill* in the court of the manor of *Taunton* (whereof this land was parcel) surrendered it to the

Sheph. Touch. 94. 1. Bro. Cas. Ch. 127.

Steward

steward there, to the use of Symms and his heirs *in perpetuum*; and afterwards the bishop agreed to that surrender, and let that land to the plaintiff. The defendant as a servant to Symms entered. *Et si super totam materiam, &c.*

PORTMAN
against
WILLIS.

The first point moved was, Whether by the devise of *omnia bona*, this lease for years did pass; for it was moved, that it was intended only of chattels personal, but not of real; and in proof thereof, 4. Edw. 6. "Grants," 51. was cited, where by the grant of *omnia bona* leases do not pass. But *catalla* comprehends as well real as personal, as Stanford 45. and the law regards this diversity betwixt them; for the writ of *feri facias* and other writs mention *bona et catalla*, which they would not do, if *bona* comprehended both.

Secondly, When the *feme* entered generally, whether she shall be said to be in as legatary, or as executrix; for if she took it as executrix, her devise thereof is void. See Moor, 351.

Thirdly, Whether this surrender into the hands of the steward, to the use, &c. and the lessor agreeing thereto, be a good surrender to extinguish the term, although it be a void limitation of the use. See Moor, 352, where it is said the surrender was adjudged to be good.

GAWDY. By the grant of *omnia bona mobilia et immobilia*, leases for years passed: so likewise it is of the grant of *omnia bona* in general; and 39. Hen. 6. pl. 35. is, that a man had rent for years, and granted *omnia bona sua*; and it was held that the rent passed: and 7. Hen. 4. is, that an executor shall have an *ejectione firme* by the equity of the statute of 4. Edw. 3. *de bonis asportatis, &c.* so the law accounts of them as goods. Ante, 377. 1. Leo. 193.

But POPHAM and CLENCH held, that 4. Edw. 6. is law in this point, that by the grant of *omnia bona* leases pass not; but they conceived that in wills they may well pass; for it is a legacy whereof the civilians are judges; and they hold that *bona* comprehends all chattels; and we in this point ought to judge according to their law.

For the second point GAWDY and POPHAM held, that she ought to have made her election before she had it as legatary, especially as this case is, it being given by the name of the residue; so as she ought to have shewn that there was sufficient to satisfy all debts and legacies over and besides that lease, and that she would have it by the name of the residue; and it is here found that she died before all the debts of the deviser were paid, so as she cannot have it as the residue until they be paid or satisfied. Ante, 348.

For the third point, of the surrender, they said little thereto. Co. Lit. 218. b. GAWDY only conceived that it was not any surrender; for it was never intended to surrender to extinguish it, but to grant it to an use, which if it takes not effect, it is void to all purposes to make a surrender. *Et adjournatur.*

May against Alvarès.

CASE TO.

ASSUMPSIT. And declares, Whereas the defendant was possessed *de diversis bonis* of the plaintiff, that the defendant, in consideration the plaintiff would forbear the goods, promised to deliver them within six months; and alledgeth *in facto* that he did forbear them for six months, and that the defendant had not yet delivered them. Upon *non assumpsit* pleaded, and found for the plaintiff, it was moved in arrest of judgment.—FIRST, That there was not any consideration, for it is that he should forbear; and he showing what species of goods.—Ante, 380. Post. 455. Hob. 216. Cro. Jac. 683. 1. Roll. Ab. 27. Moor, 854. 3. Bull. 207. 1. Sid. 45. Strange, 94.

C c 2

doth

MAY
against
ALVAREZ.

doth not shew for what time, which is not any consideration; for so he might forbear but for a quarter of an hour: and although it be alledged, that he forbear for six months, that helps not the consideration alledged.—Secondly, He doth not shew what goods they were, and so uncertain.

BUT THE COURT held it to be well enough, notwithstanding these exceptions. For as to the first, it is a sufficient consideration that he forbear; and he ought to shew for what time he forbore it: and when the defendant saith, that he would deliver them within six months, therein is implied, that the other should forbear them for six months; and therefore it is sufficiently shewn that he forbore them for six months. Secondly, there need not any certainty of the goods to be shewn; for he is not to recover them in specie, but damages, &c. Wherefore it was adjudged for the plaintiff.

CASE II.

Barton against Lever and Brownlow,

WHO WERE RECOVERORS FOR SIR RICHARD SHUTTLEWORTH.

Easter Term, 23. Eliz. Roll 356.

If tenant in tail levies an erroneous fine, and the conusee suffers a common recovery, in which the tenant in tail comes in as a common voucher; the recovery shall bar the tenant in tail and his issue of a writ of error to reverse the fine, and the recoveror may plead the recovery in bar of the writ of error.

Post. 420.

Poph. 100.

Moer. 365. 125.

2. Roll. Ab. 394.

Pigot on Recov.

140.

1. Pl. Rep. 222.

Doug. 25. 45.

483.

ERROR. The case was, That R. Barton, tenant in tail, levied an erroneous fine in 7. Eliz. and afterwards upon the 10. March, 11. Eliz. (which was the first week in Lent) a writ of entry was brought against the conusee, returnable *die Lunæ quarta septimana quadragesima proxim' futur'*; et in die Lunæ quarta septimana quadragesimæ of the same Lent. The conusee appeared and vouched R. Barton, who entered into the warranty and vouched over; and so a recovery was suffered. R. B. dies; the issue in tail brings error to reverse the fine; this recovery was pleaded in bar; and it was thereupon demurred.

ATKINSON argued for the defendant, that it was a good bar to the writ of error.—THE FIRST QUESTION was, Whether this entry into warranty, and so a voucher over, and so a recovery had, be a bar to the issue in tail to have a writ of error of the fine? And he held that it was: for by entering into warranty generally a man shall lose all rights and all actions which he hath to the land, all rents, all conditions, and every other benefit which he may have thereto; and for that purpose 2. Edw. 2. "Voucher," 208. and 7. Edw. 2. "Voucher," that rent is gone by a general entry into warranty: so 3. Edw. 3. pl. 51. 5. Edw. 3. pl. 11. that a condition is gone; so 50. Edw. 3. that his action is gone, although he would save it by protestation; and 13. Assise, pl. 1. that a baron by his entry into warranty with his feme shall lose his own action: 19. Hen. 6. by a partition betwixt coparceners, the writ of error is gone. And although it were said that this writ of error is but only an examination of the record, which is not gone by the entry into warranty, that is not so; for by his entry into the warranty, his title to have restitution is gone: and if he should reverse that fine, he is to have restitution; so by consequence the land is demanded, which is gone by this entry into warranty, and voucher over.—SECONDLY, Whether this recovery were good, or but voidable or merely void? which rested only whether these words "*proxim' futur'*" shall refer to the Lent after following; for if so, here is a recovery suffered before the return of the writ: and he held that it should refer to *die Lunæ in quarta septimana* in the same Lent, and shall not refer to *quadragesimæ*, although it were last

last mentioned : for *relatio* shall not be *ad proximum antecedens* in all cases ; and in proof thereof vouched 22. *Edw. 3.* and 28. *Hen. 8.* *Bould's Case* was cited to that purpose (a).

BRTO N
against
LEVER, &c.

HUTTON *è contra* to the first. He conceived it is not any bar, because by the fine he had neither *jus in re nec ad rem* ; and then this intended recompence cannot go to this title in tail which he had not ; and to this writ of error the issue in tail is entitled, and is not to be barred by any act of his ancestors. And therefore 2. & 3. *Eliz. Dyer*, 188. tenant in tail releaseth errors, and after is barred in a writ of error, it shall not bind the issue in tail. *F. N. B.* 108. *F.* Tenant in tail brings an attaind and is nonsuited, yet the issue shall have the attaind : and here he hath not any right to the land by the fine levied with proclamations ; wherefore he cannot have any recompence in value to bar it. And therefore 25. *Eliz.* it was adjudged in *Lord Norris v. Braybroch*, that where tenant in tail was, remainder over in tail to *Lionel Norris*, the tenant in tail suffered an erroneous recovery, and died without issue, *Lionel* in remainder was attainted of treason, and all his lands, rights, actions to land, were given by parliament to the queen, and afterwards he was restored in blood. This title to have a writ of error was not thereby given to the queen ; for it was not an action nor right to the land, but a cause to examine the record (b). Wherefore, &c.—As to the second, he conceived that of necessity *futur'* ought to refer to *quadragesima*, and not to *quarta septimana* : and therefore there is an apparent fault in the writ, and it is merely void ; for it is suffered by them who have not any day in court ; for they come in and suffer this recovery a year before the writ is returnable ; for the writ bears *teste in prima septimana quadragesimæ*, and it is returnable *die Lunæ quarta septimana quadragesimæ proxime futur'* ; which words of necessity ought to refer to *quadragesimæ*, and not to *die Lunæ*, nor to *quarta septimana* : for the rule is, *ad proximum antecedens fiat relatio* ; and in proof thereof relied upon 4. *Edw. 3.* 3. 16. *Edw. 3.* *B. R.* 652. 5. *Eliz.* 224. and 23. *Eliz.* 376. Wherefore this recovery is erroneous for this apparent fault in the record, and so no bar of the writ of error.

(b) 3. Co. 2. a.
1. Leon. 270.
Moor, 125.
Hob. 340.
Cro. Car. 438.
2. Hawk. 642.

But afterwards THE WHOLE COURT resolved for the defendant in both points. For to the first, when tenant in tail levies an erroneous fine, he hath yet a right in the land, which by his entry into the warranty, and receiving thereby an intended recompence in value, is barred : for although tenant in tail cannot by deed release errors to bar the issue in tail ; for as he is entitled to the land, so he is to the writ of error, which tenant in tail cannot release or extinguish no more than he can give the land ; yet as by fine or recovery he may bar the tail itself, so he may bar the writ of error : and here when he enters into the warranty, and vouches over, and hath recompence, he is in by his warranty of all estates ; and the recompence in value is a sufficient bar for all estates and rights : and as that shall be a bar for the land itself, so shall it bar his action also, and give away all his right to the land.

AND TO THE SECOND MATTER they held, that this recovery is not void nor erroneous ; for these words *proxim' futur'* shall not be referred to *quadragesima*, but to *die Lunæ quarta septimana* : for these words *proxim' futur'* being written in a short hand, are in a variance between a writ of entry and its return, words of uncertain relation shall be construed *ut res magis valeat quam pereat*. 1. *Bl. Rep.* 223. *Cruise on Recov.* 17. *Pigot on Recov.* 169.

(a) See 27. *Eliz. c. 3.*

BARTON
against
LEVER, &c.

different to which they shall be referred : and if it be construed *proxima futura*, then it agrees well with *quarta septimana* ; and if it be *proximo futuro*, then it agrees well with *die Luna* ; so in these two senses it may be construed that the recovery shall be good : but if it be *proxime futura*, then that refers to *quadragesima*, and the recovery is void, for that it was a judgment upon the voucher, and a recovery in value before the writ was returned, which cannot be. We must then construe it in such a manner, *ut res magis valeat quam pereat*, and according to both their intendment, and according to what seemeth most likely : for it is not to be supposed that either the plaintiff or Court intended, that the writ which was sued for his benefit should be made returnable a year after : the precedents also have been there viewed, whereof divers of them are in this manner ; whereunto regard ought to be had, that they be not construed to be void and erroneous ; when by any construction they may be made good. Wherefore, for these reasons, in *Mich.* 37. and 38. *Eliz.* they all delivered their opinions absolutely for the defendant.

1. Roll. Ab. 789.

POPHAM said, he would have the auditors and students to observe these points agreed by the Court. First, That a recovery had after an erroneous fine, shall bar the issue in tail from having a writ of error to reverse that fine. Secondly, That a recovery, although erroneous, shall bar also a writ of error of the fine until it be reversed. Thirdly, That a recovery which is void is not any bar. Fourthly, That the recovery here is not void nor erroneous, because the writ shall be intended returnable the same *Lent.* Wherefore, &c. But there was never any judgment entered in this case, because the parties were moved to compound.

CASE 13.

Pearce against Bacon.

If a copyholder claims common against a stranger, he must alledge prescription in the lord ; if against the lord himself, he must alledge it by way of usage. Ante, 353. Post, 531.

4. Co. 31. b.
Moor, 461.
Lut. 1327.
6. Co. 60.
Salk. 170.

ACTION upon the case for disturbing him in using his common ; and where *usitatum fuit, &c. infra manerium prædictum*, that every copyholder within the manor should have common in such a waste of the lord's, for two sheep for every acre of arable land ; and that the defendant being lord there, had digged holes and burrows therein for conies, and so had disturbed him of his common. After not guilty pleaded, and found for the plaintiff, it was alledged in arrest of judgment, that this prescription for a copyholder against his lord is not allowable : for every prescription by a copyholder to have common ought to be, that the lord hath had for him and his tenants, &c. so he cannot prescribe in this manner.

But all THE COURT resolved, that the prescription was good ; for there is difference where he prescribes against a stranger ; there he ought to alledge the prescription in the lord ; but where he prescribes against the lord himself, he ought to alledge it by way of usage : and although in ancient time they were accounted only but as tenants at will, and so might not prescribe against their lord, yet now they be accounted in an high regard, and as well as they may prescribe for their estate in the land itself against the lord, so may they do for collateral things for the benefit of their estates ; as common, &c. Wherefore it was afterwards adjudged accordingly for the plaintiff.

Atkinson

Atkinson *against* Atkinson.

CASE 13.

DETINUE of goods. The plaintiff had judgment, and after the year sued a *scire facias* to have execution. The defendant pleaded, that upon a writ of *distringas* awarded to the sheriff upon that judgment, he delivered such goods to the sheriff; and for the residue, that they were appraised at so much by an inquisition taken by the sheriff, and that he delivered the money to the sheriff; but he doth not aver this matter to be returned by the sheriff. Hereupon exception was taken, that this was not a plea to extort execution upon such a surmise.

Upon a *scire facias* to obtain execution, if the defendant plead that he delivered goods and money to the sheriff in satisfaction of the judgment, the plaintiff shall join issue on the fact; but if the jury find as to the goods, and are silent as to the money, it is a mis trial.

Ante, 238.
Moor, 402.
2. Ld. Raym. 1072.
1. Salk. 320.

And of that opinion at the first was POPHAM, *Chief Justice*; for then by such a feigned plea, any one who hath judgment to recover a debt, shall never have execution.—But GAWDY held, that he very well may plead it; for otherwise the defendant should be prejudiced; for he might have twenty several executions served against him upon one judgment; and he should be put to his remedy against the sheriff only, who peradventure is not worth it: and it is a lesser mischief to enforce the plaintiff, if his plea be true, to take his action for it against the sheriff; and if it be not true, to take issue thereupon.—Afterward it being moved again, all THE COURT was of that opinion; whereupon he took issue accordingly. 44. Edw. 3. 18. 20. Hen. 6. 24. 21. Hen. 6. 5. 19. Edw. 3. “*Scire Facias*”, 120. And afterwards issue being joined, the jury found for the plaintiff that the goods were not delivered, but nothing concerning the payment. And it was held for that cause to be an ill trial, and that the plaintiff could not have judgment for that which was found, but that he ought to try it *de novo*.

Easter Term,

37. Eliz. In the Common Pleas.

Sir Edmund Anderson, *Knt. Chief Justice*.Francis Beaumont, *Esq.*Thomas Walmsley, *Esq.*Thomas Owen, *Esq.*} *Justices*.Sir Edward Coke, *Knt. Attorney General*.Sir Thomas Fleming, *Knt. Solicitor General*.Clun *against* Pease and Turner.

CASE 1.

Michaelmas Term, 36. & 37. Eliz. Roll 1817.

TRESPASS. It was found by special verdict, that the place WHERE is parcel of the manor of *Brettenhall* in *Essex*, and copyhold land demisable in fee, in tail, or for life; and that one *Henry Smith* was a copyholder thereof in tail, the remainder to *Edward Smith* in tail; and suffered a recovery with common voucher in a plaint, in nature of a writ of entry, in the court of the manor (and that under it the plaintiff claimed); and that afterwards he died without issue; and that the defendant in right of *Smith* entered: and further they found, *quod nulla fuit consuetudo pro communibus recuperationibus ante usitat*. within the said manor. *Et si, &c.*

Where by custom a copyhold may be intailed, it may also be barred by a common recovery suffered in the lord's court. Ante, 372. 380. Post, 717.

Co. Lit. 60. 1. Roll. Rep. 49. Kitchen, 176. Moor, 358. 753. Salk. 340. Stiles, 430. Gilb. Ten. 167. Strange, 1197. Wilk. 26. 2. Vez. 396. Burr. 667. 1. Bac. Ab. 459. 1. Will. 26.

CLUN
against
PRASE and
TURNER.

WARBERTON, *for the defendant*. It is first found expressly, that it is an estate tail, and then it is not barred by this recovery. First, A warrant cannot be annexed to a copyhold; for he to whose use the surrender is made, is in by the lord; and he who would have a warranty, ought of necessity to be in by the party. Secondly, A warranty is at the common law, and the estate in the land is by copyhold and custom; and therefore the warranty cannot be annexed thereto: for those estates are created, and they are *demefnes*, and to be defeated by the custom of the manor; and therefore there shall not be a tenancy in dower, nor by the courtesy of them without a special custom: then without a warranty there cannot be any voucher nor recovery in value; and without a recovery in value there cannot be any bar to the issue in tail. Wherefore, &c.

GLANVILLE held, that it should bind. Writs of entry are allowable, be they with title or without title: and there are ancient precedents, that there have been recoveries there in nature of real actions and receipts, and other courses as at the common law. And the lord-keeper who now is, about twenty-six years since, purchased a copyhold within the manor of *Cashibury*, in the county of *Herts*, which was entailed, and upon great advice he was to have a recovery. And whereas it was said that warranty cannot be annexed, true it is it cannot be annexed at the time of the surrender; but it well may be by a release or confirmation afterwards: and admitting it could not be, yet none could counterplead it but the vouchee; and if he enters willingly into the warranty, that shall bind him when the recovery is had: and if it be not good to bind *in perpetuum*, yet clearly it is a discontinuance. Wherefore, &c.

But all THE JUSTICES held, that this recovery should not bind the issue in tail; for it shall not bind upon an expectancy of a recovery in value, which is the reason that it binds for land at the common law: and here he cannot have any land in value; for he cannot have any land at the common law: and he cannot have customary land; for if it should be so conveyed, the lord thereby should lose his fine; and one should hold his land as a copyholder without admittance or grant from the lord; which is contrary to the nature of copyhold, and contrary to the prescription, which is to hold by copy, &c. But it is a discontinuance clearly, which cannot be defeated by entry. Wherefore they gave day to speak to that point.—Afterwards it was adjudged for the plaintiff. But *quare*, Whether upon the principal matter or not? *Vide Hill. 37. pl. 17.*

Ante, 380.

CASE 2.

Brown against Foster.

Michaemas Term, 36. & 37. Eliz. Rell 2892.

If a surrender be made to the use of another without expressing what estate he shall have; a custom that the lord may grant it in fee to him to whose use the surrender is made, is a good custom; but it must be pleaded that he had used to do it. Kitch. 81. Co. Cop. 95. Pop. 125. Cro. Jac. 434. Cro. Car. 209. 4. Co. 29. b.

REPLEVIN. The defendant avows for *damage-feasant*. The plaintiff makes title as copyholder, and shews that within the manor of *A.* time whereof, &c. *talīs habebatur et habetur consuetudo*, that any copyholder of the manor may surrender in any place within the manor into the hands of two of the copyhold tenants, &c. AND THAT there is another custom, that if any surrender to the use of another, without expressing any estate, that the lord may

use the surrender is made, is a good custom; but it must be pleaded that he had used to do it. Kitch. 81. Co. Cop. 95. Pop. 125. Cro. Jac. 434. Cro. Car. 209. 4. Co. 29. b.

BROWN
against
FOSTER.

grant it in fee to him to whose use the surrender was made. And the plaintiff by copy (granted in this manor) made his claim. The defendant thereupon demurred.—BUT NOTE, that the defendant in his avowry claimed by copy granted by the steward of the manor; but he doth not express the steward's name.

WILLIAMS, for the defendant, moved, First, That the first custom is not well pleaded, for it is pleaded by usage and custom; but he doth not plead that ever it was put in ure in that manor, which ought to be alledged. 21. Edw. 4. pl. 28. and 22. Edw. 48. And so it was held in this court in *Sir William Hatton's Case*, where it was pleaded, *quod talis habebatur consuetudo*, within a manor, *quod licebit seneschallo* to impose a fine, &c. And the second custom is unreasonable and void; for it is to limit and charge the land with a greater estate than the copyholder gave, which is unreasonable, the lord being but the person and means of conveying it, &c.

YELVERTON *à contra*. First, The avowry is ill, because he claims by copy granted by the steward; and he doth not shew his name, which is issuable. And as to the custom, it is good and reasonable when a copyholder surrenders and shews not any estate, that the lord may grant it in fee to him to whom the surrender was made; for he is a chancellor in his own court to dispose thereof when the tenant leaves it uncertain: and therefore it was ruled here, *Lippingwell v. Bunting*, that where a copyholder bargained and sold his copyhold (but he shewed not what estate), and surrendered it to the use of the bargainee, and the lord granted it to the bargainee in fee, it was good, and the bargainee should retain it in fee.

And of that opinion was THE WHOLE COURT in this case, that this custom was good and allowable being used; so as when the tenant doth not appoint the estate of *cessy que use*, that the lord may: the interest of the land being betwixt the lord and the copyholder, it is not unreasonable that upon such an uncertainty the lord should ascertain it. But for the plea they held, that the first custom was not well pleaded; for it is not sufficient to alledge a custom that one might do such an act, but that he used to do it; as to alledge *dimissibile et dimissum*, &c. They also all agreed, that the not naming of the steward made the avowry to be ill: and then they held, that the avowry being ill, although the bar to the avowry were ill, yet he cannot have return: whereupon the parties agreed to plead *de novo*; and so the matter in law was not resolved.

Arden against Darcy.

CASE 3.

WASTE. The plaintiff prayed a writ of *estrepment* against the tenant and his servants.—ANDERSON doubted, whether it lay or no, because the plaintiff is therein to recover his damages. But WALMSLEY and BEAUMOND held clearly, that it well lies: for it may be the damages are more than the tenant can recompense if he had destroyed the house and woods; and they relied upon 4. Edw. 3. pl. 32. 12. Rich. 2. "*Estrepment*" plac' ultimo, et F. N. B. 61. which authorities are directly, that an *estrepment* lies in this action.—And BROWNLOW, the prothonotary, said, that there was not any precedent, as he remembered, that it had been awarded

A writ of *estrepment* awarded in an action of waste. Post. 484. 774.
52 Hen. 3. c. 23.
5. Co. 115.
6. Edw. 1. c. 5.
Co. Lit. 53.
6. Edw. 1. c. 13.
2. Inst. 328.

ARDEN
against
DARCY.

awarded in a writ of waste; but he said he could shew precedents where it was awarded in a writ of entry *sur disseisin*. And THE COURT said, they were all one; for there damages are recoverable. THE COURT also commanded them to search precedents, whether it lay against servants; for they doubted thereof. But it was afterwards awarded (a).

(a) Besides this *preventive* redress at common law, the courts of equity upon a bill exhibited therein complaining of waste and destruction will grant an injunction.

CASE 4.

Vaughan against Beal.

Prohibition does not lie for suing in the spiritual court for tithes of lands holden of the crown in *capite*.

PROHIBITION being prayed for suing in the spiritual court, for the tithes of lands holden of the queen *in capite*; it was now moved, that consultation should be awarded, for that there is not any cause to grant a prohibition; for then he never should have any remedy for them: for if he may not sue for them in the spiritual court, he cannot sue for them here.—And all THE COURT held, that a prohibition lay not: for although *N. B. R.* 401. is, that a prohibition lies in this case, yet that is to be intended where it is sued in chancery, where peradventure they may give remedy for the tithes. But because they were informed, that there are the like precedents in the queen's bench, they said, they would further advise.

CASE 5.

Hutchinson against Lewson.

In debt on bond conditioned to save the plaintiff harmless, the defendant must shew that he was not damaged, or that he had satisfied the condition.
Ante, 253.

Cowp. 47.

DEBT upon an obligation conditioned. WHEREAS the plaintiff was obliged in such obligations for the defendant, that if he were charged or molested in his body or goods for those obligations, he would within a month satisfy him for it; the defendant saith, that he had paid him such a sum for all his charges within a month. It was thereupon demurred.—And without argument it was adjudged for the plaintiff; for he ought to shew how the plaintiff was molested, and that he had satisfied so much; or that he was not molested: as if one be obliged, that he shall make such assurance as the plaintiff's counsel shall devise; it is not sufficient to say that he made such an assurance, but he ought to say that the plaintiff's counsel devised such an assurance, which he had made. Wherefore, without further argument, it was adjudged for the plaintiff. *Vide* 5. *Edw.* 4. *pl.* 8. 22. *Edw.* 4. *pl.* 15. 35. *Hen.* 6. *pl.* 10.

CASE 6.

Ward against Lambert.

Hilary Term, 35. Eliz. Roll 34.

A bargain and sale "for divers causes" and consideration "tious" without money, is not good; tho' it be recited the bargainee was bound by recognition for the bargainor.

UPON a special verdict the case was, That one by indenture, reciting, "That whereas J. S. was bound in a recognizance and other bonds for him; now he, for divers good considerations, bargained and sold the lands to him and his heirs." The deed is inrolled within the six months (a), but it was found there was not any money paid: and, Whether this was a good BARGAIN AND SALE, or not? was the question upon demurrer.

ANDERSON. Every owner of land may part with it as he pleaseth, if it be according to law; and here it is not shewn that the bargain and sale was because the vendee was bound for him;

1. Ro. Ab. 783. 1. Leon. 170. 1. Co. 176. 2. Vent. 137. 7. Co. 40. Cro. Jac. 127. Strange, 1113. Will. 91. 1. Wood's Con. 656. Gilb. Uses, 29, 31. 34, 112, 253. 1. Vern. 137.

and

and if he were, yet it cannot be a good bargain and sale. But if there had been apt words, he might thereby have raised an use by way of covenant, but clearly not a bargain and sale.

WALMSLEY accord. In every bargain and sale there ought to be a *quid pro quo*. But the vendor here hath nothing for his land, and therefore it is void, but it might have risen by way of covenant; but there ought to have been apt words, *viz.* a covenant to stand seised to uses: for if I give land, or bargain or sell land to my son, no use ariseth thereby.—And to that opinion the OTHER JUSTICES inclined, that it is not good by way of bargain and sale, but that it had been a good consideration to raise an use by way of covenant. Wherefore it was adjudged accordingly.

(a) See 27. Hen. 8. c. 16.

Anonymous.

ACTION upon the case was brought for these words: "Thou art forsworn, and I will make thee flower the pillory, or else it shall cost me a hundred pounds."—*Et per TOTAM CURIAM*, an action lies not; for **ANDERSON** said, there is a great difference betwixt the words "forsworn" and "perjured." For "forsworn" is, where he swears against the truth in ordinary discourse; but *perjurium est quando jus alterius pervertitur*, which is to be intended in a judicial proceeding. And this difference hath been allowed of: *quod CURIA concessit*. But to say, "he was forsworn in such a court," or betwixt such parties, an action lies. Wherefore it was adjudged for the defendant.

Jackson against Neal.

Trinity Term, 36. Eliz. Roll 2987.

EJECTIONE FIRMÆ. It was found by special verdict, That the Lord **Hunsdon** was seised of the manor of *Paris-Garden* in the county of *Surrey*, wherein are divers copyholds, and made a lease of two of the copyholds and of the court baron for two thousand years, saving to himself the other demesnes and services. The lessees kept court there, and a copyholder surrenders to the use of *A.* in fee. *A.* obtains licence in court to let it for one and twenty years, from *Michaelmas* last past. He makes a lease afterward for one and twenty years to begin at *Christmas* following to the plaintiff, who entered, and being ousted by the defendant, brings an *ejectione firmæ*: and, Whether this were a good grant by copy, and this lease by the copyholder allowable or not? was the question.—And all THE COURT held, that it was a good copy: for **ANDERSON** said, this case hath been often in question; for it was the case of *Lord Hatton* for his tenants of *Wellingborough*, and of divers others since that time. And it hath been oftentimes held, that the Court may well continue as to that purpose for admittance of copyholders; for otherwise every one of his own act might destroy his copyholder's estate.

AND SECONDLY, They conceived that the lease is not warranted by this licence, and then no *ejectione firmæ* lies upon this lease.—Afterwards in *Trin. 37. Eliz.* judgment was given for the defendant upon this point of the lease.

Owen, 73. Moor, 184. Cro. Jac. 437. 2. Com. Dig. 510. Gilb. Ten. 297. Dougl. 53. 292. 565; 1. T. Rep. 705. 2. Term Rep. 241. 380. 781.

Trinity

WARD
against
LAMBERT.

CASE 7.

The difference between the words *forsworn* and *perjured*.
Ante, 135.

Cro. Car. 283.

CASE 8.

If the lord of a manor grants the inheritance of all the copyholds, the grantee shall hold customary courts, &c.

Ante, 39. 103;

4. Co. 26. b.

2. Leon. 208.

2. Com. Dig.

486.

Gilb. Ten. 209.

211.

2. T. Rep. 415.

A copyholder must pursue his licence to lease.

Ante, 288.

Post. 462.

Trinity Term,

37. Eliz. In the Queen's Bench.

Sir John Popham, *Knt. Chief Justice.*Sir Francis Gawdy, *Knt.*John Clench, *Esq.*Edward Fenner, *Esq.*Sir Edward Coke, *Knt. Attorney General.*Sir Thomas Fleming, *Knt. Solicitor General.*} *Justices.*

CASE 1.

Grenningham against Ewer.

Hilary Term, 37. Eliz. Roll 806.

To debt on bond conditioned to deliver up three obligations, or to seal such a release of them as should be devised by the obligee before such a time; it is a good plea in bar of the action that the obligee did not devise any release before the time mentioned. Post. 539. 718.

1. Roll. Abr.

447.

Gould. 142.

Moor. 395.

Poph. 98.

5. Co. 22. a.

1. Mod. 264.

1. Burr. 375.

1. Wood's Con. 301. 783.

DEBT upon an obligation conditioned, That if the defendant delivered unto the plaintiff three obligations, wherein the plaintiff was obliged unto him, or sealed and delivered to the plaintiff a release of them, as should be devised by the plaintiff's counsel, before *Michaelmas*, that then, &c. The defendant pleads, that neither the plaintiff nor his counsel did devise any release before *Michaelmas*. Judgment *fi actio, &c.* And it was thereupon demurred.—GAWDY held it to be a good plea; for there is a rule in law, that the conditions of obligations are always for the benefit of the obligor, and shall be expounded liberally for him: then there be two things to be done, *viz.* to deliver the obligations, or to make a release; and a release cannot be made by the act of the obligee, because he did not devise it: so by his act part of it becoming impossible to be performed, the law shall discharge him of the other part; and it may be he had lost the obligations, so as they might not be delivered; and the intent of both was but only to have them discharged, which may be by a release made. Wherefore, &c.—CLENCH. Without doubt he ought to do the one or the other, or at least-wise to offer himself to the obligee, that he is ready to make the release, so as there be not any default in him; for he ought to do the first act: for it may be, the obligee would have required him to have made the release, and he could not be found; so he by his own act would have avoided the obligation, which is not reasonable.—FENNER accord. First, it is plain if both things rest in the power of the obligor to perform, he may perform the one or the other at his election; and if before the day of performance, it becomes impossible to perform the one thing or the other, by the act of the obligee or of God, that he is discharged of the obligation; and so it was adjudged 4. *Edw. 6. in Bendlow's Reports*; although it becomes impossible by the act of God. But here the obligor hath not election to do the one or the other; but he hath power of himself to do the one thing, *viz.* to deliver the obligations; and of the other, by a contingent act to be done by the obligee at the election of the obligee, if he will advise it. But forasmuch as the obligee hath not advised it, the obligor is now bound to deliver the obligation, the non-performance whereof is a forfeiture of the obligation.—POPHAM accord. If it were disjunctive and absolute to per-

form

form the one or the other at the election of the defendant, and one part afterwards becomes impossible to be performed by the act of the obligee, the obligation shall thereby be discharged; but it is not here disjunctive at the first: but upon a possibility afterwards it may come to be disjunctive, viz. if the obligee devise the release; the which devise not being made, the condition is single and absolute to deliver the obligations. As if *A.* were obliged to infeoff me of certain land, or upon the return of *B.* from *Rome* to pay me twenty pounds, if *B.* never returns, yet he shall infeoff me. And it is clear, if the second part of the condition had been, that he should make me such a release as *J. S.* a stranger should devise, and he did not devise any, that the obligor ought to have performed the first part of the condition. But here, because the obligee himself did not devise the release, the question is, Whether he shall have advantage of the obligation? And I conceive it to be all one with the case of 4. *Hen. 7.* If one be obliged to infeoff me of such land, or to marry *A. S.* before such a day, and a stranger marries *A. S.* before the day, yet he ought to make the feoffment: but if the obligee married with *A. S.* before the day, the obligation is discharged. The reason there is, because there is an absolute disjunctive condition at the first; and when the obligee himself dispenseth with the one, the obligation is discharged. But here it is but a simple condition, without the act subsequent of the obligee; which act not being done, the obligation remains always on the one part to be performed; which not being performed, it is forfeited. Wherefore, &c. (a).

GREENING-
HAM
against
EWER.

(a) It was
moved again,
and adjudged for
the defendant,
post. 539.

Collet and Marsh.

Ante, Page 371. Case 14.

CASE 2.

IT was now moved again.—And GAWDY held it to be erroneous, and that it might well be assigned for error; for against any thing done or returned by the sheriff as an officer there may be an averment. As, 6. & 7. *Eliz. Dyer*, 234. a bishop certified, that he offered the oath to an ecclesiastical person, according to the 1. *Eliz. c. 5.*; an averment may well lie against it, that he did not offer it. So if a bishop certifies a refusal of the payment of tithes, yet an averment lies against it; and the 31. *Eliz. c. 3.* is, that “the summons shall be made at the church-door, and returned.” So it is in the copulative, that the proclamation of the summons shall be made and returned; and it is not sufficient to be returned, for then the statute is of little purpose.

In a *precipe quod reddat* if the sheriff returns that the defendant was summoned, when in fact he was not, yet a *grand cape* must issue; for it cannot be assigned for error in the judgment by default.

Ante, 80. 371.

1. Roll. Ab. 621.

But all THE OTHER JUSTICES *à contra*. For at the common law, if the sheriff returned the party summoned where he was not, and thereupon a *grand cape* was awarded, there was not any remedy, but a writ of deceit, and not error; for the Justices ought to credit the officers; and it is not any error in them to award a *grand cape*. So here, forasmuch as it is of record before them, that the party was summoned according to the statute, they are bound to award a *grand cape*, and no error in them. This statute doth not intend to give other remedy than was at the common law for the tenant: and it is not reason, that this awarding of a *grand cape*, upon this summons returned, and default recorded, should be said to be erroneous in the Court. Wherefore the judgment was affirmed.—But POPHAM and FENNER conceived in this case,

COLLET
and
MARSH.

case, that the party might have a writ of deceit, if the proclamation of fummons were not made according to the statute; for now he is not summoned according to law. But CLENCH and GAWDY *contra*, because it is a good summons by the summoners upon the land.—Wherefore, &c.

CASE 3.

Day *against* Austin.

Hilary Term, 37. Eliz. Roll 295.

In debt for rent
upon a lease the
defendant may
deny its validity.

Owen, 70.
Savil. 132.
Cowp. 588.

DEBT for rent upon a lease for years. The defendant pleaded, that before the lease a judgment was given in debt against the plaintiff, at the suit of J. S. and afterward he made this lease; and afterwards this land was extended and delivered in execution by *elegit*; before which extent, there was "*nothing in arrear*." It was thereupon demurred.—And without argument adjudged to be a good plea.

CASE 4.

Stroud *against* Marshall.

Infamy cannot
be pleaded in
bar to debt on
bond.

Post. 612.

F. N. Br. 202.d.
2. Bl. Com. 291.

2. Bac. Ab. 527. 649. 3. Bac. Ab. 87. See Mr. Hargrave's note [2] Co. Lit. 247. 2. 1. Term Rep. 390.

DEBT upon an obligation. The defendant pleads, that at the time of the obligation made, he was *de non sane memory*. And it was thereupon demurred.—And adjudged to be no plea; for he cannot save himself by such a plea, and the opinion of *Fitz-Herbert* held to be no law. Wherefore it was adjudged for the plaintiff.

CASE 5.

Eaton and Monox *against* Laughter.

Trinity Term, 36. Eliz. Roll 407.

If a condition
be in the dis-
junctive, giving
a liberty to do
one thing or an-
other at the
election of the
party, and the
one part be-
comes impossi-
ble, the condi-
tion is void.

Moor, 357.

Poph. 98.

Co. 5. 21. 2.

1. Lutwyche,
688.

Post. 864.

2. Mod. 200. 203.

Co. Lit. 145.

225. 206. 2.

Pop. 98.

1. Roll. Ab. 450.

Jones, 171. 181.

3. Mod. 232.

1. Salk. 170.

2. Peere Will.

(617).

3. Peere Will.

189. Lit. 254. 352. Sed vide Moor, 645. 1. Ld. Raym. 279. Sayer, 243. 1. Wood's Con. 312.

DEBT upon an obligation of 400l. conditioned, "That if one *Rainsford* aliened his wife's land, if then during her life he purchased other lands of as good title and annual value to his wife and her heirs; or do, or shall leave her by his last will so much in value, by making her his executrix, or in a legacy; that then, &c." The defendant pleads, that the *feme* was dead, and that *Rainsford* is yet alive. The plaintiff by replication for breach, shews the time of the death of the *feme*; and that the said *Rainsford* neither in her life nor since her death had purchased land of such a value. And it was thereupon demurred.

ATKINSON and COKE argued, *for the defendant*, that the obligation was not broken; for it is in the disjunctive, that he shall leave so much to his wife by his will, or purchase lands, &c. and the first is become impossible to do by the act of God; therefore he is discharged of both. And in proof thereof they relied upon 15. Hen. 7. pl. 2. 2. Edw. 4. pl. 2. 16. Hen. 6. "*Action upon the Case*," 44. & 9. Eliz. 262. The other part is also impossible to perform according to the condition, *viz.* to purchase lands to the wife and her heirs, the wife being dead; and the purchase need not to be made to the heir, for the heir is not named, but to take by way of limitation, and not otherwise; as in *Bret and Rigden's Case*. And if it ought to be made to the heir, yet the obligation is not forfeited; for *Rainsford* is yet alive, and hath time during his life to perform it.—HUTTON and TANFIELD *contra*. Al-

though

though the defendant hath a disjunctive condition, he ought to perform the one or the other at his peril, and so is 21. *Edw.* 3. pl. 29. And although the husband had time during all his life to perform it, yet it ought to be done during his wife's life; for otherwise the obligation is forfeited. As to infeoff, to reinfeoff the feoffor, he at his peril ought to do it during the life of the feoffor; for that the time being uncertain, he ought to perform it. But if there had been a certain time to do the one thing or the other, and it is become impossible by a subsequent act, that the one of them should be performed before the day, he is discharged of both.—And HURTON cited *Glen's Case*, Mich. 35. & 36. *Eliz.* Rot. 1227. to be adjudged in the common pleas; where *A.* promised to *B.* that if *C.* did not appear at *Westminster* such a day, that he would pay unto him twenty pounds; and pleads that *C.* died before the day: and ruled to be no plea; for he ought yet to have paid the twenty pounds. So 18. *Eliz.* in *J. Rhodes' Rep. Barber's Case*, in *C. B.* that where one was obliged that *A.* should appear the first day of the ensuing Term in the star-chamber, or otherwise he would pay twenty pounds, *A.* dies before the day, so as by the act of God he could not appear; yet it was ruled that the twenty pounds should be paid, or otherwise the obligation should be forfeited. And Mich. 34. & 35. *Eliz.* in *C. B.* this case was betwixt *Trop and Bedingfield.* *A.* was obliged in one hundred pounds upon condition, that he should stand to the award of *J. S.* if he made any before the feast of *M.* or otherwise at the said feast of *M.* to be at such a place, so as he might be arrested at the suit of the obligee, or else to pay twenty pounds at the said feast of *M.* No arbitrament was made before *M.* *A.* died, and the twenty pounds was not paid at *M.* It was adjudged that the obligation was forfeited.—POPHAM. It cannot be so as you put the case; but if it were that he should appear, or that he should appear there, or otherwise that he should pay twenty pounds, and he died before the day, yet the twenty pounds ought to be paid; for there is not any disjunctive condition, that he should do one of the two things at any time before. But until *Michaelmas* he is obliged only to appear; and if he appears not, then comes the second condition to have his essence, viz. to pay the twenty pounds; so it is not to be paid but upon the non-performance of the other.—And afterwards in the principal case, all THE JUSTICES resolved, that the obligation was not forfeited; for by the express words of the condition, it is limited to *Rainsford* to perform it at any time during his life; and the impossibility thereof cometh by the act of God, which shall not turn the obligor to any prejudice: so as now, being prevented of part of the time, he is discharged from performing it. But when the law appoints a man time to do a thing during his life, he ought at his peril to see it is performed, otherwise the obligation is forfeited. And when a man hath election to do one thing or another before a certain time, and by the act of God it is become impossible that he should perform the one, the law shall privilege him for the other, that he shall not forfeit any obligation by the non-performance thereof.—And so FENNER said it was adjudged in 4. *Edw.* 6. in *Bendlow's Reports.*—And they all (except GAWDY) held, that the obligation was for ever discharged. But GAWDY conceived, that the obligation was not yet forfeited,

EATON
and
MONOX
against
LAUGHTER.

Co. Lit. 219. b.

Ant. 277.

Post. 364.

1. Bac. Ab. 433.

Ant. 396.

EATON
and
MONEX
against
LAUGHTER.
Lit. Sect. 352.

forfeited, but that he ought, during his life, to purchase lands to the heir of his wife, otherwise the obligation should be forfeited; but THE OTHER JUSTICES were against him in that point. Wherefore it was adjudged for the defendant. 5. Co. 21. b. 22.

CASE 6.

Welcome against Gryll.

Michaelmas Term, 36. & 37. Eliz. Roll 354.

A variance in the christian name between the writ and the judgment is error.

Moor, 366.
Gold, 124.
Cro. Car. 463.

ERROR upon a judgment in the common pleas. The error assigned was, That a writ of debt was brought by THOMAS WELCOME; and the judgment entered; *quod prædictus JOHANNES WELCOME recuperet, &c.* where it should have been THOMAS. And it was prayed that it might be amended; for it was but a mis-prision and mis-entry of the clerk.—*Sed non allocatur.* But the judgment was reversed.

Vent. 217. Hob. 327. Ray. 39. Comb. 64. Cowp. 425.

CASE 7.

Meggs against Griffith.

Slanderous words reported as bear-say are actionable.

Moor, 408.
Gould, 138.
Post. 645.

ACTION for these words: "One told me, that he heard say, "that *Mistress Meggs* had poisoned her husband;" *ubi revera nullus dixit, &c.* Upon not guilty pleaded, it was found for the plaintiff; and now alledged in arrest of judgment, that an action lies not for these words; for it is but a report of a bear-say, which cannot be any discredit.—But notwithstanding it was adjudged for the plaintiff; for it is a great defamation, and is a cause of drawing her name and life in examination. Wherefore, &c.

CASE 8.

Howel against Williams.

Easter Term, 36. Eli. Roll 333.

Writ of entry at common law will not lie while the tenant by the courtesy is alive, but after plea he shall be intended to be dead.

F. N. Br. 207.

ERROR upon a judgment in a writ of entry *ad communem legem*. The error was assigned, in that it was not shewn in the count, that the tenant by the courtesy (who aliened) was dead; for otherwise this writ lies not; but the writ of entry *in consimili casu*.—*Sed non allocatur.* For although this action lies not in the life of tenant by the courtesy; so that if he be alive, the plaintiff hath not any cause of action; yet it shall be so intended, especially when the tenant hath pleaded thereto, and admitted it; and if he were alive, the tenant ought to have alledged it. Wherefore, the judgment was affirmed.

CASE 9.

Sir Humphrey Ferrers and Others against Wignal.

Hilary Term, 37. Eliz. Roll 848.

Is a justification to trespass under a grant of a seoffment of a manor, the attornment shall be intended; for it is collateral to the title.

TRESPASS, as executor of *Edward Holt*, for the taking of an ox. The defendant justifies as servant to *John Arden*, for that *Sir John St. Leger* was seised of the manor of *Bardefsey*, within which manor is such a custom, that every tenant of a messuage

within

within the manor dying seised thereof should pay an *heriot*, viz. his best beast; and that the lord might seize it; and that one *John Holt* was tenant of a messuage within the manor; and that *Sir John Saint Leger* infeoffed of that manor one *Corbert* and *Lewson* to the use of the said *John Ardern*; and that afterwards the said *John Holt* died seised of that messuage, which descended *cuidam Edwardo Holt*; and that he died seised being possessed of that ox: thereupon he as servant to the said *John Ardern*, and by his command took it as an *heriot*, &c. And it was thereupon demurred.—First, For that he entitles *John Ardern* to the manor as a purchaser, viz. by feoffment; and sheweth not the attornment (a) of *John Holt*, the tenant, whose services are demanded; for otherwise he cannot entitle him to the services of that tenant: and although a man may plead the feoffment of a manor, and that by force thereof he was seised of that manor, without shewing the attornment of the tenants (for it is necessarily to be intended as livery without pleading it); yet when he will entitle himself to the services of any particular tenant, he ought expressly to shew his attornment.—*Sed non allocatur*; for THE COURT said, there was not any difference in the pleading of the one case more than of the other, but that the attornment may be well intended: and if he did not attorn, the other ought to have pleaded it. And they all here agreed, that by the feoffment of the manor the services passed not without an express attornment: but that may well be intended in the pleading, if the contrary be not shewn.

SIR HUM-
PHRY FER-
NERS and
OTHERS
against
WIGNAL.

2. Bl. Com. 330

8. Co. 82. b.
Yelv. 135.
Co. Lit. 310.
Cro. Jac. 102.
Bull. N.P. 249.

ANOTHER EXCEPTION was taken, for that he pleads this messuage to descend *cuidam Edwardo Holt*, and doth not say *præd. Ed. Edwardo Holt testatori*; so it shall be intended to a strange person; and then the plea is not good.—*Sed non allocatur*; for he justifies the taking after the death of *Edward Holt* the testator; and to him it shall be intended to be referred, and not to any other. Wherefore without any great argument it was adjudged for the defendant.

An omission of
the word
“*aforesaid*,”
supplied by
intendment.

(a) Attornment is now rendered unnecessary by 4. & 5. Ann. c. 16. and 11. Geo. 2. c. 19.

Yelverton against Yelverton.

Hilary Term, 35. Eliz. Roll 272.

CASE 10.

UPON demurrer the case was, The father covenanted by indenture, in consideration of natural affection, to stand seised of all his lands which he had, and which he afterward should purchase, to the use of himself for life, and after to his youngest son and his heirs; afterwards he purchased land and died: and, Whether the eldest or youngest son should have it? was the question.—BACON argued for the youngest son, that he should have it; for this covenant shews his intent expressly, and is to work in future; and therefore good enough: as if a man deviseth lands which he hath not, and after purchaseth them: so if one covenants that he will purchase lands before *Michaelmas*, and that before *Easter* following he will levy a fine of those lands which shall be to such uses, and he levies a fine, and doth not limit any uses, it shall be according to the covenant before the purchase (*quod fuit concessum RER CURIAM*); for they shall be as uses declared upon that fine whereof he shewed his intent before.—But in the principal case all THE COURT held, that this covenant vests nothing in the younger son, and is not sufficient to vest any use in him of this

A covenant to stand seised to a use of lands which the covenantor should afterwards purchase is void.

Post. 423. 493.
2. Ro. Ab. 790.
Moor, 342.
N. 7, 19.
Winch. 60.
Fitz. 237.
1. Salk. 237.
2. Will. 75.
Gilb. on Uses, 116.
Powell on Dev. 191.
2. Bl. Com. 330.
3. Burr. 1490.
Term Rep. 91.

Cowp. 94. Dougl. 716. 1. Term Rep. 435. 2. Term Rep. 578. 3. Term Rep. 91.

YELVERTON
against
YELVERTON.

land; for a man cannot by a covenant raise an use out of land which he hath not: for no more than a man may charge, let, or grant a thing which he hath not, no more may he limit an use out of land which he hath not. Also upon every feoffment or purchase, the feoffor or donor from whom the land passeth is to limit the uses to the feoffee or purchaser; then before the purchase one cannot limit how the use shall be, viz. that it shall be to his youngest son, where the feoffor hath limited it to the use of him and his heirs; which should be to limit an use out of an use, which the law will not suffer: therefore judgment was given accordingly for the eldest son. And here a case was cited in 20. *Eliz.* (but neither the name nor in what court was mentioned) that a mortgagor intreated a stranger to redeem the land at the day; and covenanted by indenture, that after such redemption the stranger should have the land to him and his heirs; and that he in consideration of such a sum would stand seised to the use of him and his heirs; the stranger redeems the land at the day, the mortgagor enters, the deed is enrolled within the six months: yet ruled that nothing passed; because he had not any estate or interest therein at that time to contract for it.

CASE II.

Beswick against Cunden.

Hilary Term, 35. *Eliz.* Roll 403.

If a dam be made in a river, so as to occasion an overflow of water upon the adjoining land, the tort is not extinguished by the sale of the land; and the purchaser may maintain an action on the case for the continuing nuisance; for every continuance is a fresh nuisance.

Ante, 197. 257.
Post. 520.

Moor, 353.
1. Ro. Rep. 221.
T. N. B. 124.
1. Co. 73. 101.
Co. Lit. 56.
2. Leon. 129.
9. Co. 55.
Dyer, 319.
Yelv. 144.
Noy, 112.
Ed. Raym. 277.
2. Salk. 459.

ACTION upon the case. For that the defendant levied a dam in such a river such a day, whereby it surrounded the land of J. S. who afterwards infeoffed the plaintiff thereof; and that the defendant *adhuc malitiosè custodivit* the said dam, whereby the plaintiff's land is surrounded. Upon this declaration it was demurred in law.

PELHAM. The action is not maintainable, in regard the plaintiff had not any thing in the land at the time of the nuisance erected; and there is not any new thing done to his injury; and in proof thereof cited 4. *Affise*, 3. 2. *Hen. 4. pl. 11.* 18. *Edw. 2. Affise*, 374. But the case in 14. & 15. *Eliz. Dyer*, 319. is good law; for there the *Lady Brown* made a new nuisance by every turning of the cock, for which she was punishable, although she made it not at the first; but here the land was surrounded by the levying of the dam, and continued surrounded; so the first nuisance continues till this present; and therefore the feoffee shall not have his action.

FOSTER, *à contra*. The action is not brought for the levying of the dam, but for the continuing thereof from such a day to such a day which was after the plaintiff's purchase; and *Fitz. N. Br.* 11. that the heir of the feoffee shall have it against the feoffee of him who levied it. And in *Pasch. 25. Eliz.* it was adjudged in this court, in *Rolf's Case*, where one erected an house so near to another's that the rain descended from the new house, &c. and the heir brought an action upon the case for the nuisance made by building the house in his father's time, and recovered by judgment.

GAWDY, *Justice*. The action is well brought for continuing of the first nuisance, but not for the levying thereof; and therefore the action is well brought for the keeping it up in his time, and not for the levying thereof.

POPHAM. There will be a difference when there is not any profit remaining unto him to whom the nuisance is levied. That it is clear that none shall have the action but he to whom it is done.

BRISWICK
against
CUNDEN.

done; as if I have pot-water running from my river to my home, and T. S. stops it in his land before it comes to my land, and I die, or make a feoffment over, my heir or feoffee have not any remedy for this *tort* made before their time. But where any profit remains which comes to the heir or feoffee after the nuisance done; there for so much of the profit as is come unto them, and is taken from them by the continuing of the nuisance, they shall have their action: then here by the levying of the dam the inheritance of him to whom it was levied is not taken away; but although his land be surrounded, some profit remained unto him, which he hath conveyed to the feoffee; which being taken from him by the continuance of the nuisance, it is reason that the feoffee should have his action. And therefore if one levies a bank in a river, whereby part of my land is surrounded, and afterwards I make a feoffment of my land to T. S. and afterwards another part is surrounded by reason of that bank, he shall have an assise of nuisance (*quod fuit concessum*): so here, for that the land of the feoffee grew *a malo ad pejus de die in diem*, by reason of the inundation made by this dam, it is reason the feoffee should have his action. The same law is for a *non feasant*, viz. for not repairing of a bank, where, &c.

CLENCH and FENNER, *è contra*. Because the *tort* before made is extinguished by the feoffment; and there is not any thing done since the feoffment which the feoffee could punish. Wherefore, &c.—But afterwards in *Mich. 37. & 38. Eliz.* being moved again, all THE JUSTICES agreed, that the action was well brought. Wherefore it was adjudged accordingly for the plaintiff (a).

(a) Vide post. 520. where it appears that judgment was given for the defendant, upon a new objection.

Brook against Watson.

CASE 12.

ACTION upon the case. And declares, Whereas he was an alderman and a merchant in York, and had always kept a true debt book, that the defendant spake of him these words; "He is a false knave, and keepeth a false debt book; for he chargeth me with the receipt of a piece of velvet, which is false." After not guilty pleaded, and found for the plaintiff, it was moved in arrest of judgment, that an action lay not for those words.

Words not actionable. Moor, 409.

HUBERT, for the plaintiff, moved, that the action was maintainable, because they touch him in his trade of living; for in a merchant fidelity in his trade is requisite; for he many times buys and sells his wares upon trust.

But all THE JUSTICES held, that the action lay not. For the first words, "He is a false knave," it is clear that an action lieth not. And for the second part, that "he keepeth a false debt-book," it is not actionable, for it is not any discredit unto him; for it may be his servant keepeth it, or that somewhat might by oversight be mis-entered therein. And it is not of necessity that every merchant should have a debt-book; and by that discredit there is not any discredit to his trade: as to say of a counsellor, that "he mis-enters the name of his client in his book, viz. the plaintiff for the defendant," is not any cause of action; but to say, that a counsellor gives ill counsel, or that a merchant is a bankrupt, an action lies; because it toucheth them in their profession. POPHAM also said, that the action was not maintainable, because the defendant spake only of a grie-

Baonk
against
WATSON.

vance unto himself by that false entry, and not in general words to discredit him; for if he had said to others, "Take heed how you deal with him, for he keepeth a false book," then peradventure an action would lie, because he drew other customers from him. Therefore it was adjudged for the defendant.

CASE 13.

Stringer against Stanlack.

Hilary Term, 37. Eliz. Roll 325.

Trespass for a wrongful taking and detention in prison. Plea a justification by legal process. Replication that he detained him after a *superfedeas* to the writ. This is a departure from the declaration; for it only complains of the tortious imprisonment, and omits the wrongful taking. Ante, 9.

Lut. 583. 1402.
Cro. Jac. 180.
2. Mod. 57.
Fost. 344.
1. Mod. 194.
1. Mod. 225.
366.
10. Mod. 206.
307. 351.
12. Mod. 230.
385. 541.
Ld. Raym. 399.
4. Ba. Ab. 463.
404. in *mis*.

FALSE IMPRISONMENT. For that he took and imprisoned him for the space of an hour. The defendant pleaded, that a *capias ad satisfaciendum* at the suit of J. S. issued to the sheriff of Wilts against the plaintiff, who made his warrant to the defendant to arrest the plaintiff; whereupon he by virtue thereof arrested the plaintiff. *Et hoc, &c.* The plaintiff replies, that after the writ of execution awarded, and before the caption and imprisonment, he satisfied the sheriff of the monies, &c.; whereupon the sheriff made his warrant, directed to all his bailiffs, &c. that they should cease the execution; and that he delivered it to the plaintiff; and that the defendant arrested him; and presently after the arrest he shewed unto him this discharge; and yet notwithstanding he detained him in prison for the space of an hour. The defendant rejoins, that he was illiterate; and presently after the delivery of the warrant of *superfedeas* from the sheriff, he went to a literate man to know the effect thereof, and in the *interim* detained him in prison; and as soon as he was informed of the contents thereof he set him at large. It was thereupon demurred; for it was said, that he taking upon him the office to be a bailiff, ought not to be ignorant thereof, or what he is to do; and that pretence of ignorance shall not excuse him, but at his peril he is to take notice of this discharge, &c.

FENNER. When he is once taken by force of a *ca. sa.* the sheriff himself could not have discharged the prisoner without offence to the law, although he had received the monies; for the writ is, *capias ad satisfaciendum, ita quod habeas corpus ejus, &c.* So although he pays the money, yet the sheriff ought not to discharge him; and if he do, he is chargeable with an escape: wherefore his warrant is no warrant to the bailiff, after he was once arrested, to discharge him; and the defendant did well, and no tort in detaining of him. And of that opinion was **POPHAM**, Chief Justice.

But **GAWDY** and **CLENCH** held, that in regard it was but a writ of execution, and to have the money in court, he having received the money, ought not to have arrested the party; and if he hath arrested him, might well discharge him. *Vide* 33. Hen. 6. pl. 48. per **Danby**. 13. Hen. 7. pl. 16. 21. Hen. 7. pl. 23. But as to the point of the bailiff's ignorance they delivered not any opinion. But **FENNER** held, that he well might take time to be informed thereof, and he is not compellable to take notice of it. But **POPHAM** doubted thereof.

GAWDY then moved an exception to the replication; for it is, that after this warrant of *superfedeas* from the sheriff delivered unto him, he detained him in prison; and so complains of the tortious imprisonment, but speaks nothing of his caption, whereof he complained in his declaration; so there is a manifest departure as to it, for it maintains not his count. And so, for this cause only, it was adjudged for the defendant.

Peter Carye's Case.

CASE 14.

PETER CARYE was indicted for drawing his sword *in aula Westmon. sedentibus Curii*; and in disturbing the sheriff in making an arrest upon one *T.* by force of a bill of *Middlesex*; and being arraigned and found guilty, had judgment of perpetual imprisonment, and to pay a hundred pounds to the queen.

Drawing a sword in Westminster-hall is indictable, tho' out of the view of the Courts.

AND NOTE, Upon the evidence it appeared to be upon the stairs ascending the court of wards, and so out of the view of the Courts.—But **POPHAM** said, although it were out of the view of the Courts, yet if the indictment had been as it ought to have been (and as we have precedents thereof in *Edw. 4.*) viz. *coram domina regina*, the judgment should have been, that his right hand should have been cut off, and that he should forfeit all his lands and chattels, and have perpetual imprisonment.

3. Inst. 140.
Owen, 120.
1. Hawk. 38.
2. Hawk. 63a.

Gray against Fletcher.

CASE 15.

Hilary Term, 37. Eliz. Roll 601.

REPLEVIN. The defendant justifies for *damage feasant*. The plaintiff claims common in the place *WHERE*, &c. Issue thereupon; and the jury found the prescription; but further found, that he and all those whose estates, &c. had used to pay for the said common every year a hen and five eggs: and if, &c. they prayed the discretion of the Court. It was thereupon moved, that it was found against the plaintiff, for it is not found as he alledged; for he alledgeth it as absolute, and it is found conditionally, viz. if he paid for it.

If the jury find that the plaintiff has common *prout* he prescribed, and also a usage to pay a hen yearly *pro eadem communia*, yet the verdict is good, for they are two prescriptions.

POPHAM. I was of counsel with a *Devonshire Case*, where a man prescribeth to have pot-water out of a river; and issue thereupon; and found that he used to have it, paying sixpence by the year; and adjudged that it was found against him who prescribed. But that is not like to this case; for there was a condition executory every year with the prescription, and therefore it ought to be intirely alledged. But here it is a thing collateral from the prescription, and the prescription is perfect without alledging it; wherefore it is well enough found for the plaintiff.

Po. 415. 445.
546. 563.
S. C. 5. Co. 78. b.
Co. Ent. 573.
Co. Car. 533.
1. Saund. 320.
Carter, 88.
9. Co. 78.
1. Roll. Rep. 121.
Hob. 42.
Lucas, 223.
Bull. N. P. 59.
1. Willf. 253.
1. Burr. 442.
Cowp. 47.
Doug. 666.

GAWDY said, that if the hen and eggs were not paid, in this case he might distrain the plaintiff's beasts going upon the common, although it were upon his own land; *quod POPHAM concessit*. Wherefore it was adjudged for the plaintiff. 26. Hen. 8. pl. 5.

CASE 16.

Wilcocks against Watfon.

Hilary Term, 37. Eliz. Roll 1011.

DEBT upon an obligation against him as executor of *A.* The defendant pleads *plenè administravit*; and issue thereupon. The jury find a special verdict, that *A.* made *E.* his executrix, and died possessed of divers goods, which *E.* made a fraudulent gift of all her goods to *J. S. &c.* and continued in the possession of the goods, which she being sole executrix, has made a gift of by covin, shall be charged as executor *de seu tort*. Vide 43. Eliz. c. 8. 2. Term Rep. 77. 37. 197. Me. 196. 2. Leon 223. 5. Co. 54.

A husband who after the death of his wife executrix, has goods, which she being sole

D d 3

them,

WILCOCKS
against
WATSON.

2. Brown's
Cases in Chan.
323.
Post. 365.

Y. Cr. 89.

CASE 17.

Wheeler against Collier.

Hilary Term, 37. Eliz. Roll .

If an admini-
stratrix promise
to pay a debt of
the intestate's
in consideration
that the creditor
sends her in
more goods, an
assumpsit will
lie for both
debts, and judg-
ment *de bonis
propriis* may be
given.

Moor, 419.
2. Cr. 110.
Noy, 19.
Vent. 268.
2. Lev. 110. 228.
3. Lev. 74.
2. Keb. 314.
Show. 366.
Salk. 10.
Carth. 236.
Hob. 68. 184.
4. Burr. 2155.
Ante, 91. 102.

them, and took the defendant to husband and died; that the defendant is possessed of part of those goods of the value of, &c. and paid legacies; and if those goods should be found to be assets in his hands, they found for the plaintiff; and if, &c. for the defendant.—FENNER held, that they should not be assets; for although being but fraudulent, it shall be said to be a void gift against the donor and creditor, and so liable to his debt: yet it is good betwixt the donor and donee; and shall not be said to be assets in the hands of any but the donor or donee; but here the husband is a mere stranger thereto. Wherefore, &c.—But all THE OTHER JUSTICES *à contra*; for they by the common law (the gift being fraudulent) are liable to the plaintiff's execution. And POPHAM said, if the gift were good against all but creditors (as it is), then they belong to the donee, and in his hands are liable to this debt; and if the gift be void, they remain to the executors of the *feme*; and then the *baron* having taken them and paid legacies, is chargeable by reason thereof, as executor *de son tort deme/ne*. And so those goods *quâcunque viâ datâ*, are liable to this debt in whose-soever hands they come, unless by title paramount, or by sale *bonâ fide*. Wherefore it was adjudged for the plaintiff.

ASSUMPSIT. And declares, that the *baron* of the defendant was indebted to the plaintiff in fifty pounds for beer, and died intestate, and administration, &c. was committed to the defendant; and that afterwards the defendant, in consideration that the plaintiff would deliver unto her six barrels of beer, assumed to pay to the plaintiff, as well the fifty pounds due by the intestate, as for the six barrels delivered unto herself; and that he thereupon had delivered to the defendant six barrels of beer, &c.—And after *non assumpsit* pleaded, and found for the plaintiff, and entire damages assessed, as well for the one debt as for the other, it was moved in arrest of judgment, that the plaintiff should not recover; because for the intestate's debts the judgment should be against the defendant, *de bonis testatoris*; and for the beer delivered unto herself, *de bonis propriis*; and therefore the plaintiff ought not to have joined them in one action, or at leastwise, that damages ought to have been severed by the verdict.

POPHAM. It is clear that one cannot join in one action an *assumpsit* of the testator, and an *assumpsit* of the defendant for his own debt; but here the defendant assumed for the debt of the intestate and her own debt; and if several judgments be to be given, it is clear that there ought to be several actions brought for them. And I conceive that several judgments shall be given, *viz.* for the intestate's debt, if he hath, &c. *Et si non, de bonis propriis*; for, if judgment should be given *de propriis bonis* generally, then she, notwithstanding she had no more goods of the intestate's than to satisfy that debt, should be bound to pay legacies; and that payment should not excuse her, which is not reasonable.

But all THE OTHER JUSTICES *à contra*; because this action is brought against her of her own *assumpsit*: the judgment shall be general in both cases *de bonis propriis*, for it is a charge by her own

act; yet if it had been *de bonis testatoris*, she should have paid it to them, and it should have been allowed unto her. And here by her *assumpsit* as administratrix, it is become her own proper debt, as if she had entered into an obligation. Wherefore, &c.—Afterwards, *Mich.* 37. & 38. it was adjudged for the plaintiff.

WHEELER
against
COLLIER.

Bateman against Spring.

CASE 18.

Hilary Term, 37. Eliz. Roll 363.

ASSUMPSIT in *London*. The defendant pleads a concord in *Suffolk* of all matters, trespasses, &c. but in *London*, ABSQUE hoc that he assumed in *London*. The plaintiff maintains his declaration, and traverses the concord; and it was thereupon demurred.—And after argument, it was adjudged to be a good traverse; for otherwise by a false plea a man should make all actions transitory to be local, which is against law: and of that opinion was THE WHOLE COURT. Wherefore it was adjudged for the plaintiff.

Intransitory ac-
tions, if the de-
fendant traver-
ses the place, the
plaintiff may
take a traverse
upon the traverse.
Ant. 99.
Co. Lit. 282. b.
1. Strange, 115.
Ld. Raym. 121.

Trinity Term,

37. Eliz. In the Common Pleas.

Sir Edmund Anderfon, Knt. Chief Justice.

Sir Francis Beaumont, Knt. }

Thomas Walmsley, Esq. } Justices.

Thomas Owen, Esq. }

Sir Edward Coke, Knt. Attorney General.

Sir Thomas Fleming, Knt. Solicitor General.

Christopher Baker against Searle.

CASE 1.

Hilary Term, 37. Eliz. Roll 1144.

EJECTIONE FIRMÆ. Upon not guilty pleaded, a special verdict was found, that *Edward earl of Bedford* was seised in tail of the rectory of *D. et decimis inde*, &c. (which are the tithes in question) and let it to *John Willet* and his assigns, for the lives of *Christopher Baker*, *Joan Baker* his feme, and *Christopher Willet*; and that the said *John Willet* demised the said rectory and tithes to one *Danbury* and his heirs, to the use of *Christopher Baker* the plaintiff for eighty-nine years, if any of the *cesti que vires* should so long live; *virtutis ejus dismissionis idem querens fuit possessionatus*, until the defendant entered, &c.

A verdict in
ejectment find-
ing a lease by
tenant in tail,
must also find
the commence-
ment of the
estate, and the
life of the te-
nant.
Ante, 118.
Post. 440.
Co. Lit. 441.
2. Cro. Jac. 112.

2. Roll. Ab. 445, 446. 5. Com. Dig. 51. 79. Cowp. 316. Post. 442. Ant. 131.
3. Lut. 373.

D d 4

remainder

BAKER
against
STANLEY.

And it was hereupon moved for the defendant,—FIRST, That the verdict was not good for the plaintiff, because he doth not shew the beginning of the estate tail, which is the particular estate: and that THE COURT held to be an apparent fault. Also he doth not aver the life of the tenant in tail; so the lease of the tithes, which consists in grants, was determined by his death. As also, for that the use is not limited to *B.* but for years only, so the remainder of the use is in *Danbury*, and the life of *Danbury* is not averred: and if he be dead, *Christopher Baker* the plaintiff is in as an occupant, and then no *ejectione firmæ* lies in the case. But THE COURT held clearly, that there is not any use limited but for the years, because the residue of the estate is in *Willet* the grantor, and not in *Danbury*. And it is all one as to this purpose, with a feoffment to the use of one for life; the use for the residue of the estate is in the feoffor; and clearly, there cannot be any occupancy, because it is granted to *Danbury* and his heirs, which excludes the occupancy.

ANOTHER EXCEPTION was taken by *WALMSLEY*, for that he saith, *virtute cujus dismissalis*, where he comes in by the limitation of an use; so it ought to have been, *et virtute statuti*, &c. And this was held to be an apparent fault in substance and not in form.—Wherefore it was adjudged for the defendant.

CASE 2.

Mathewson against Lydiate.

Where several enter into several covenants in the same deed, a release to one of the covenantors will not discharge the others.

Post. 470. 546.

2. Roll. Ab. 30.

5. Co. 22, 23.

2. Salk. 574.

Bull. N. P. 268.

5 Com. Dig.

232.

DEBT was brought upon a charter-party indenture. The case was, Indentures were made betwixt the master and three others of a ship on the one part, and *G. Lydiate* and six other merchants on the other part; whereby the owners of the ship covenanted with the merchants to ship such merchandises to such a port beyond seas, and to recarry from the said port certain other merchandises to some port in *London*; whereby every of the merchants covenanted severally to pay for every tun brought to *London*, to any port there, thirty shillings; and if they made default in payment, to pay three pounds for every tun; and for twenty tuns brought to a port at *London*, and not paying thirty shillings for every tun, he demanded sixty pounds. The defendant pleads, that the seal of one of the merchants was *debrused* from the deed: and it was thereupon demurred.

GLANVILLE. This deed is several for every of them; and although the seal of one of them is *debrused*, it is not material, for it remains good against the others; and it is not like to the case 3. *Hen. 7. pl. 5.* for there the obligation is joint and several. And this case is common in *London*, for they covenanted severally; and when any one of them hath performed his part, the manner is to pull off his seal, and then the deed is cancelled against him, and remains good against the others. And this very point was adjudged before *DANIEL*, *serjeant*, in *London*; and afterwards debt was brought thereupon in this court, and the plaintiff recovered (which *DANIEL* being present affirmed, and that he adjudged it upon conference with some of the Justices).

But

But in the principal case the record was viewed, and it appears that he alledged, that he brought the merchandise to *Ratcliffe* within the county of *Middlesex*, and so he hath not shewn that it was brought to a port in *London*; and although *Ratcliffe* is one of the ports of *London*, yet it is not so averred. Wherefore, without regard to the matter in law, it was adjudged for the defendant.

(a).

(a) This case was revived upon a new action, and adjudged for the plaintiff, post. 470. 546.

MATHEWSON
against
LYDIATE.

Snelling against Norton.

CASE 3.

DEBT against him as administrator to one *Norton* upon an obligation. The defendant shews the custom of *London* to be, that if a contract be made by a citizen to pay money to another citizen, and he who made the contract dies, that his executors or administrators shall be chargeable therewith, as if it were upon an obligation: and shews further, how the intestate was indebted upon a contract to one *A.* who had recovered against him; and that he had *riens ouster en ses maynes*, &c. And it was thereupon demurred.

GLANVILLE moved, that this custom was not good. For first, It is against law, that an executor or administrator should be charged upon a simple contract. Secondly, It is against law, that a stranger should be barred of his debt upon specialty, by reason of a debt upon a simple contract. Wherefore, &c.

DANIEL *à contra*. The custom was always to bind the executors or administrators to pay debts upon contracts; and customs in *London* are confirmed by parliament, and are now as strong as a statute: and therefore in *London* they prescribe to give land in *mortmain*, which is against statute law; and there is not any custom but that it deprives, and is against the common law in some point. And this custom is reasonable; for a debt upon a contract is as well due as a debt upon an obligation; and therefore there is as great reason for the payment of the one as of the other, although the law hath given a greater prerogative, *viz.* a priority of paying the one rather than to the other: and although it might seem hard to have allowed this custom in this court, if it had been originally pleaded here; yet when the custom hath been executed against the administrator by the laws of the city, whereto he is subject, it would be mischievous unto him to be disallowed it here, for then he should be twice charged without remedy; and this difference is taken in 1. *Edw.* 4. 8.

OWEN, Justice. The custom is reasonable; for the executor in conscience is bound to pay debt upon a contract as well as upon specialty: and such a matter was about four years since in this court, but not adjudged.—And of that opinion were THE OTHER JUSTICES, especially as this case is, being executed against him, who is liable and chargeable by the customs of *London*.

And afterwards, in *Mich.* 37. & 38. *Eliz.* it was moved again, and another exception taken, for that the custom cannot be to bind the administrator, because he begins to be chargeable by the statute of 31. *Edw.* 3. c. 11. and no action lay against him at the common law.

But

By the custom of
London, DEBT
lies against exe-
cutors and ad-
ministrators for
a simple con-
tract of their
testator or in-
testate;—and a
plaintiff cannot
be nonsuited af-
ter the Court
have given their
opinion on the
point of law.
5. Co. 82. b.
Post. 843.

22. *Edw.* 4.
pl. 2.
Priv. Lond. 146.
149.
1. *Edw.* 4.
pl. 6. b.
1. Saund. 67.
8. Co. 126. 2.
43. *Edw.* 3.
pl. 11. b.
9. Co. 63.
Noy, 53.
Cro. Car. 196.
Moor, 136.
4. Inst. 247.
c. Com. Dig 197.
1. Bac. Abr. 639.
691.
2. Bac. Abr. 435.

SNELLING
against
NORTON.

5. Co. 82. b.
Cro. Jac. 35.
Post. 658.

(a) 5. Co. 82. b.
2. Inst. 397.
9. Co. 39. b.

But it was denied PER TOTAM CURIAM; for an administrator was chargeable, and to be sued at the common law, but he might not sue: and the statute was but in affirmance of the common law (a); and they were sued as executors at the common law: and so it is 19. *Edw. 3. "Covenant,"* 24. And the case of 8. *Eliz.* 274. that an action lies not against them at the common law, is not law in this point. The plaintiff would then have been nonsuited; *sed non potuit* (forasmuch as two of the Justices had delivered their opinion), no more than after a verdict. Wherefore it was adjudged for the defendant.

Michaelmas

37. & 38. Eliz. In the Queen's Bench.

Sir John Popham, *Knt. Chief Justice.*

Sir Francis Gawdy, *Knt.*

John Clench, *Esq.*

Edward Fenner, *Esq.*

} *Justices.*

Sir Edward Coke, *Knt. Attorney General.*

Sir Thomas Fleming, *Knt. Solicitor General.*

Vicary against Farthing.

CASE 1.

TRESPASS. The parties were at issue; and at the trial by *nisi prius* in the county of *Devon*, to prove the nonage of the plaintiff at the time of the lease made (which he would avoid), a church book was given in evidence; and after the jury's departure from the bar, and before they had agreed upon their verdict, the plaintiff's solicitor delivered to the jurors the said church book: and afterwards they found for the plaintiff. And all this matter being examined before WALMSLEY, Justice of assise there, he returned this verdict and all this matter upon the *poslea*.

Parish-books and registers are good evidence to prove births and marriages; and when produced, the jury may have them out of court while they are conferring on their verdict.

And now for this cause it was moved by SERJEANT HEALE, that judgment should be stayed; and in proof thereof cited 11. *Hen.* 4. 18. 35. *Hen.* 6. "Examination," 17. 14. *Hen.* 7. 2. and also one *Medcalf's Case*, which was in the common pleas, anno 34. *Eliz.* where a witness examined gave evidence to a jury; and afterwards one of the jury, when they were conferring upon their verdict, called him to recite his evidence again, which he did, and affirmed upon his oath upon his examination, that he did not speak more or less than before; and yet this matter being returned upon the *poslea*, it was resolved, that no judgment should be given upon that verdict: and *Hugh Wiatt* said, that in this queen's time it was ruled in one *Pickering's Case*, that where letters patents were given in evidence to the jury, and afterwards when they were conferring upon their verdict, the plaintiff, without the Court's direction, delivered unto them the said letters patents, which were given in evidence, that judgment was for this cause stayed upon the verdict.

Ante, 139.
Post. 616.
1. Roll. Ab. 715.
Moor, 451.
7. Mod. 129.
Co. Lit. 227. 411.
2. Hale, 507.
2. Roll. Ab. 687.
Bull. N. P. 308.
5. Mod. 395.
Ld. Ray. 337.
744.
6. Mod. 81.
Salk. 645.
5. Com. Dig. 174.
Cowp. 17. 593.
Doug. 171.
1. Term Rep. 466.

GAWDY and POPHAM denied that case. But GAWDY said, that as this case is, the Justice of assise might have refused this verdict; and it is also clear, that *writings* or books which are not under seal, cannot be delivered to the jurors without the assent of both parties; but being delivered by the Court without the assent of the parties, neither of the parties can avoid the verdict, in regard they were given in evidence before; and the Court had given direction to the jury concerning their validity, especially being evidences in writing, which cannot be altered, nor by intendment cannot induce the jury further to their verdict, than the shewing of them in court had done before; but *Medcalf's Case* might well be,

VICARY
against
FARTHING.

be, because it being but evidence by parol, the witness might peradventure alter his testimony before given by a greater enforcement, or otherwise, than he said before (although upon his examination he would not confess so much), which peradventure was the cause to move the jury to give their verdict; wherefore it shall be a good cause to stay the judgment.—And of that opinion were POPHAM and CLENCH: for otherwise it would be very mischievous to the party for whom this verdict passed, if the delivery of evidence by the contrary party, or peradventure by a stranger, without his privity, should stay his judgment; which is the reason that eating and drinking by a juror (unless it be at the costs of the party for whom the verdict pass) shall not avoid the verdict.—But FENNER *à contra*; because there might be some matter in this book to induce them otherwise than they intended before; and because it was delivered on his part for whom the verdict passed. Wherefore it was adjourned.—But afterwards, in *Trin.* 38. *Eliz.* it was adjudged for the plaintiff.

Co. Lit. 227. b.
1. Freem. 79.
2. Jones, 83.

See 7. Jac. 1. c. 12.

CASE 2.

Courtier against Barret and Sampson.

Hilary Term, 36. Eliz. Roll 496.

In *replevin*, if the plaintiff is nonsuited, and the jury find damages, it is no verdict, but only an inquest of office.

Ante, 339.

1. Bac. Abr. 91.
1. Com. Dig. 333.
3. Com. Dig. 157.

ERROR upon a judgment in the common pleas in a *replevin*. The defendant avows for *damage feasant*. The parties were at issue. The plaintiff was nonsuited after evidence; and the jury assessed damages for the avowant. The plaintiff brings error, and assigns for error a *discontinuance*, for that the plaintiff declared in *Michaelmas Term*, and that the defendant imparled until *Hilary Term*, and from *Hilary Term* till *Easter Term*, and there is not any continuance: and then the plaintiff declared again (as the manner there is), and the defendant pleads thereto, and issue there joined.—It was moved, that this was not now to be assigned for error, because it is after verdict, and so aided by the statute of jeofails.—But it was ruled by the WHOLE COURT, that it was not aided; for here the plaintiff being nonsuited, there is not any verdict given: but in that whereof the jury are to enquire of damages, their verdict is but an office of inquest, and no verdict whereof, &c. And it was cited to be here adjudged so betwixt *Buffy* and

(*) Ante, 339. *Ireland* (a).

If the plaintiff declares in one Term, and after imparlance to another declares *de novo*, a continuance must be entered.
Ante, 339.
Post. 416.

3. Com. Dig. 177.

SECONDLY. It was moved, that here was not any discontinuance; for the second declaration is a new declaration of itself, and doth not refer to the first: and there ought not to be any continuance of the first; for it is not an *alias prout patet*, &c. so it cannot be intended to refer to a former.—But it was thereto answered, that it is not the manner to make such entries in the common pleas; yet it may be well intended to refer to the former proceedings: wherefore they sent for two of the prothonotaries of the common pleas, who came and informed the Court, that their course was not to make an *alias prout patet*, but to make all their declarations *de novo*, and yet they referred to the first record. Wherefore for this discontinuance the judgment was reversed,

Hoe against Taylor.

CASE 3.

Easter Term, 37. Eliz. Roll 369.

ERROR upon a judgment in the common pleas in trespass, for cutting down underwood. The defendant justifies by reason of a lease of the land made unto him by J. S. for years. The plaintiff shews, that the said J. S. was seised of the manor of *Milford*, whereof that place, &c. ; and that the underwood growing in that place, where, &c. had time, whereof, &c. been demised by copy ; and that the said J. S. before the lease to the defendant, granted unto him and his heirs by copy, &c. the underwood there from time to time growing, to be cut down by the plaintiff and his heirs, *quolibet anno*, four or five acres *annuatim*, &c. whereupon he was thereof seised, *secundum consuetudinem*, &c. until the defendant entered and made the trespass.

The defendant demurred in law ; and after argument it was there adjudged for the plaintiff.—And it was now assigned for error, First, That underwood growing cannot be demised by copy ; for here the soil itself is not let, but only the underwood annually growing : which was agreed by THE COURT, that the land itself here was not demised by the copy.—Secondly, That notwithstanding this grant to the lessee, that the lessor might well cut down the underwood ; for it is but in nature of the grant of *estovers*, where the grantor may take trees with the grantee.

But THE COURT resolved for the plaintiff, that the action was maintainable ; for this underwood is a thing of inheritance and perpetuity ; for after every cutting down, they will grow again from the stubs ; and so may be well demised in fee by copy : and as *estovers* might be granted in fee, so might this also.—FENNER said, that he knew a market within the manor of *Crookborn*, in the county of *Somerset*, to be demised by copy ; and it was said here that *Sir John Bourn's Case* was adjudged, that a grant of tithes by copy was good.—They also held, that the grantor here could not meddle with the woods, nor his lessee ; for he hath entirely granted the underwood, and not *estovers*, or so many loads of wood. Wherefore the judgment was affirmed. *Vide 4. Co. 30. b.*

Sir Christopher Blunt's Case.

CASE 4.

IN an information upon an intrusion by the queen against *Sir Christopher Blunt*, a juror was challenged for non-sufficiency of freehold ; and by the examination of the juror it appeared, that he had freehold of the value only of fifteen shillings *per annum*.—Yet it was ruled by THE COURT, that he had sufficient to pass on that jury ; for at the common law, if a juror had any freehold it was sufficient. But by the 1. *Hen. 5. c. 3.* he ought to have forty shillings *per annum* ; and by the 27. *Eliz. c. 6.* he ought to have four pounds *per annum*, where the damages exceeded forty marks *per annum*. But the statutes speak only between party and party, which extends not to the queen ; wherefore the juror was sworn. But it was ruled, that he ought to have some freehold ; and therefore one who had not any freehold was there challenged and withdrawn.

See also 4. & 5. Will. c. 24. 7. & 8. Will. 3. c. 32. and 3. Geo. 2. c. 25. & 19. 4. Geo. 2. c. 25. § 20.

Hardy

Underwood is a thing of inheritance and perpetuity, and may be granted in fee by copy of court roll ; and will support trespass *quare clausum fregit*.

Post. 814.

1. Roll. Ab. 49°.

4. Co. 30.

Co. Lit. 48. b.

58.

Co. Cop. 112.

Moor, 355.

Strange, 1238.

Burr. 1324.

Grand jury must be freeholders ; but to what amount is uncertain.

Co. Lit. 277. a.

2. Roll. Ab. 647.

Cro. Jac. 672.

2. Hale, 155.

4. Bl. Com. 302.

3. Bac. Abr. 255.

2. Hawkins,

308, 583.

CASE 5.

Hardy against Seyer.

Easter Term, 37. Eliz. Roll 254.

A lease of a house was made to a widow for 40 years, *sub conditione quod si tamdiu vixerit sola et inhabitaverit*; and she died in the house unmarried within the term. These words make a condition, and the lease shall go to her executor.

S. C. Poph. 99.
Owen, 107.
Gouldf. 179.
1. Roll. Abr. 410. 843.
Co. Lit. 204. 236.
Dyer, 138. b.
3. Leon. 16.
Moor, 400. 848.
Roll. Rep. 367.
2. Co. 72. b.
5. Co. 9. b.
Bull. 153.
Cro. Jac. 390.
Vaugh. 32.
1. Wood's Con. 272.
1. Term Rep. 389.

EJECTIONE FIRMÆ. Upon a special verdict the case was, A lease was made to a widow for forty years, *sub hac tamen conditione, quod si tamdiu vixerit sola et inhabitaverit* within the said house. The widow continues unmarried in the said house all her life-time, and dies within the forty years; and. Whether the term was determined? was the question betwixt the executor of the widow and him in reversion: for if those words were a condition merely, and not a limitation, the term remains; for she performed it during all her life, until it became impossible by the act of God, which shall not turn to her prejudice: but if it were a limitation, "if she should so long inhabit therein," it is otherwise.

GAWDY, CLENCH, and POPHAM, held, that the words "*sub conditione, quod si, &c.*" are void words; for they are insensible, and are neither limitation nor condition: for all conditions shall be taken strictly; and no words shall be supplied by intendment to make a condition to divest or to destroy an estate: and it is no more here than that a man makes a lease for years rendering rent—*sub conditione quod si* the rent be not paid—and says no more, which is without sense: for it may be intended that he should forfeit a pain, or that the lessor should re-enter, which is uncertain; and every *quod si* ought to be answered with the words *quod tunc*, thereby to make the intention of the parties full, what shall be done; for otherwise we cannot judge of their intention; for it may be they intended that then she should forfeit a penalty, or parcel of the term, or part of the profits: and for this uncertainty it is void and of none effect, and the lease is absolute. But if the words were that the lease was for forty years, "if she so long live unmarried, and inhabited therein," POPHAM held it to be a limitation, and to determine the lease by her marriage or death, so that she cannot inhabit therein: and so Bromley affirmed was the intent of the parties, and the truth of the case, and that it was mistaken in drawing the verdict; for the words *sub hac conditione quod* were not in the lease.—But FENNER held, that the words "*sub conditione*" are full enough to make a condition of re-entry without any other, and supply the defect subsequent, and are a condition and not a limitation; and that this condition is well performed, and the lease remains absolute.—Wherefore it was adjudged for the plaintiff.

CASE 6.

Evington against Brimston.

Trinity Term, 36. Eliz. Roll 86.

A private nuisance is not within the jurisdiction of the leet.

Moor, 356.
2. Roll. 83.
2. Cr. 382.

TRESPASS of his beasts taking. The defendant justifies as a distress for an amercement in a leet in *Spalding*, because he left his gate open, *ad nocumentum inhabitantium, &c.*—ET PER TOTAM CURIAM this is not a nuisance enquirable; for it is a private injury, and the amercement thereof ill. And judgment was given for the plaintiff.

4. Omi. Dig. 167. 1. Hawk. P. C. 361. 1. Saund. 135.

Buskin against Edmunds.

CASE 7.

Trinity Term, 37. Eliz. Roll 628.

DEBT upon demurrer. The case was, That *A.* let lands to *B.* in the county of *Bucks*, rendering rent at the receipt of the Royal Exchange in *London*; and for non-payment a re-entry. The rent was not demanded, nor tendered at the day; the lessor entered; and, Whether his entry were congeable or not without demand? was the question.

GAWDY held that it was: for being reserved out of the land, there needed not any demand, as *the abbot of Hyde's Case* is; and in 16. *Eliz. Dyer*, in the bishop of *Exeter's Case*, where issue was taken upon the tender, which proves that a demand is not requisite. But **THE OTHER JUSTICES** held, that there ought to be a demand at the place where it is payable; for it remains yet a rent, which in its nature is demandable by him who would have it; and they said, that so it hath been adjudged before these times. Wherefore it was afterwards adjudged accordingly, that the entry of the lessor was not lawful (a).

Rent made payable at a place off the land is still a rent; and must be demanded at the place.

Ante, 167.

Post. 435. 636.

1. Roll. Abr.

459.

Moor, 408.

2. Roll. Rep.

420.

Co. Lit. 202.

1. Bac. Abr.

417. in *quis.*

4. Bac. Abr.

355.

1. Burr. 284.

Dougl. 483.

1. Wood's Con. 283.

(a) It was moved again, and adjudged for the plaintiff, post. 636.

Boraston against Hay.

CASE 8.

Trinity Term, 36. Eliz. Roll 1101.

TRESPASS. The defendant pleaded, that the land was copyhold land, parcel of the manor of *Abberfley*, in the county of *Worcester*; and that the custom there is, that if a copyholder in fee hath a wife at the time of his death, and two sons or more, that the wife shall have that land during her life as a free-bank; and that if the eldest son dies, living the wife, although he hath issue, his issue shall not have it, but the second son; and shews that *Robert Boraston*, grandfather to the plaintiff, was a copyholder of that manor, and died before his wife, having issue the plaintiff's father, and one *John Boraston* his second son; that the wife held herself in her free-bank; and that the eldest son died, living the wife; and that afterwards *John Boraston* the younger son was admitted, and surrendered to the defendant's use, &c. and issue was taken upon this prescription; and the jury found the custom as before, and that the younger son should have it, unless the eldest son was admitted thereto as to the reversion, or made fine for it with the lord in his life-time. *Et si super totam materiam, &c.* the Court shall adjudge the defendant guilty, they found the defendant guilty; if otherwise, not guilty.

A custom that a wife shall have all her husband's copyhold lands in fee as her free-bench for life in preference to his children, is good, but it must be found precisely as it is pleaded.

Ante, 405.

Post. 546.

Moor, 359. 566.

Co. Lit. 33.

111.

F. N. B. 150.

Bro. Cust. 44.

58.

Cro. Jac. 126.

4. Mod. 251.

Carth. 275.

Salk. 185.

Cowp. 481.

Upon this verdict it was moved by **TANFIELD**, that it was found for the plaintiff; for the custom is not found in that manner as he pleaded it; and therefore it is found against him who pleaded it; for he pleaded a general custom without exception; and the custom found is with an exception and special.—And of that opinion were **ALL THE JUSTICES**, that the custom found is not the custom put in issue; wherefore it is found against the defendant, as the case in 2. *Eliz. Dyer*, 192. where a custom was pleaded, that a *feme* should have it during her life; and it was found that she should have it *durante viduitate* only. Afterwards **POP-**

HAM

ROBASTON
against
HAY.

HAM said, it is a common case, that if there be a prescription to have common for all his beasts, and it is found that he ought to have common for all his beasts *levant & couchant*, it was found against him who pleaded it. FENNER was of opinion to give judgment presently for the plaintiff; but it was then moved that here was not any verdict found upon this issue; for they concluded their verdict, *fi, &c.* they found the defendant guilty; if otherwise, not guilty, &c. and so there is not any conclusion of the point in issue. And of that opinion were ALL THE JUSTICES upon view of the record, and that for this cause it was insufficient and a gross fault; whereupon a *venire facias de novo* was awarded.

CASE 9.

Warner against Winch.

Easter Term, 37. Eliz. Roll 53.

In C. B. if the plaintiff declare twice on the same original, and one declaration varies from the other, it is error.

Antc. 412.

Post. 507.

Cro. Jac. 537.

ERROR of a judgment in debt in the common pleas. The error assigned was, That the plaintiff declares for a debt upon an action of twenty pounds; and after imparlance declares *de novo*, and therein demanded a debt of eighteen pounds; and had judgment to recover.—And it was held to be erroneous, for that there were but one original and two declarations, and the one varying from the other: and therefore it was adjudged here *Mich. 36. and 37. Eliz.* where in debt upon an obligation dated 1. *Maii*, the second declaration was upon an obligation dated 2. *Maii*, and thereupon judgment, that it should be reversed. Whereupon the judgment here was afterwards reversed.

See 4. and 5. Ann. c. 16.

CASE 10.

Goodwin against Grudge.

If judgment in debt is affirmed on a writ of error, the plaintiff shall have execution without *scire facias*. — Post. 706. 5. Co. 88. 1. Inst. 471. 6 Mod. 288. Salk. 322. Strange, 301. 1. Roll. Rep. 104. contr. a. Sed vide 2. Burr. 660. 3. Bac. Abr. 362. 4. Bac. Abr. 412. 2. Ld. Raym. 507.

ERROR upon a judgment in debt, where the judgment was affirmed.—It was held by ALL THE JUSTICES, and so the clerks said was their usage, that the defendant in the writ of error shall have execution presently without a *scire facias*, although the year and day be passed since the first judgment *Vide 15. Hen. 7. 5.*

CASE 11.

Badcock against Atkins.

In words spoken of another by a character or description which is equally relative to several, the declaration must aver, that the plaintiff was the person spoken of.

1. Roll. Abr.

84. 25.

Cro. Car. 177.

443.

1. Roll. Rep. 79.

ACTION for these words: "Thy father," *innuendo* the plaintiff, "hath stolen six sheep." The defendant justifies, and issue taken thereupon, and found for the plaintiff. It was alledged in arrest of judgment, that the declaration was not certain, nor sufficient to shew that he spake those words of the plaintiff. For it is not averred that he spake them to the plaintiff's son, nor that the plaintiff's son was there present; and then it cannot be intended of the plaintiff; and the *innuendo* will not help this uncertainty. And although the defendant hath admitted it by his plea, yet that shall never help a declaration which is defective in substance: but if it were defective in form only, as by leaving out the place where a thing was done, or by pleading a collateral plea, that may be made good, as 18. *Edw. 4. 16.* and 6. *Edw. 4. 2.*—And of that opinion were ALL THE JUSTICES (except GAWDY), that the declaration was not good; for it cannot be intended to be spoken of the

the plaintiff more than of any other person, unless it had been averred, that his son was there present: and although the defendant by his plea confesseth, that he intended them of the plaintiff, yet that shall not help the declaration, which is insufficient. But *GAWDY è contra*: because it shall be intended, that the plaintiff's son was there, for otherwise he could not have said, "thy father." But notwithstanding it was adjudged for the defendant.

BADCOCK
against
ATKINS.

Sale, Lessee of Nevel, (*who claimed to be LORD LATIMER*)
against Barrington.

CASE 12.

EJECTIONE FIRMÆ. The defendant pleaded not guilty; and after issue joined, the queen sent a special writ to the Court, reciting how the defendant was tenant in tail, with divers remainders over, the reversion to the queen, and that her reversion might be prejudiced by this trial: wherefore it was commanded them not to proceed to the trial of this issue *reginâ inconsultâ*. It was thereupon much disputed, whether this writ were allowable or not; because it is a personal action only, wherein it appears not how the queen can be prejudiced; for it may be the plaintiff claims his lease under the queen's title. It was also objected, that in regard the defendant is tenant in tail, with divers remainders over, the reversion to the queen, it is a very remote cause to have aid. By the statute also of 2. *Edw.* 3. c. 8. and 11. *Rich.* 2. c. 10. justice ought not to be hindered by the king's writ, either under the great or petit seal; and therefore this writ shall not be any cause of delaying this suit.—But COKE the *Queen's Attorney* said, that this was not to delay justice or hinder right, but to do right; for it is neither law nor justice, that the queen should be prejudiced in her inheritance without being made privy, which ought to be by *aid-prayer*. And when the defendant will not pray in aid, this writ is in nature thereof to inform the Court how it concerns the queen, and to inhibit the proceedings until, &c. For if the Court be informed by pleading that it concerns the queen in her inheritance, they *ex officio* ought to stay it until the queen be consulted, &c. and when they do not, she may by law enforce them by her writ; and that such a writ hath been awarded, appears by *Fitz. N. Br.* 154. 21. *Edw.* 3. 44. & 31. *Edw.* 3. "Saver Default," 27. But these are in real actions; yet it may also be in personal actions, where the queen's title appears to come in question; and so is 2. *Rich.* 3. pl. 13. And although he be tenant in tail, remainder over, who is impleaded, yet it is all one; for tenant in tail shall have aid of the queen, but not of a common person, as appears by 10. *Hen.* 7. pl. 20. & 38. *Edw.* 3. pl. 14. And that this is allowable in a personal action after issue, as well as *aid-prayer* shall be allowed, stands upon one reason, and is one law; and so it hath been put in ure. And Mich 34. & 35. *Eliz.* in the common pleas, in an *ejectione firmæ* by one *Blofield* for lands, parcel of the possessions of the earl of *Arundel*, after issue such a writ was awarded as is here, and by advice of all the Justices was allowed.—And it was held by ALL THE JUSTICES here, that this writ ought to be obeyed; forasmuch as it appears unto them, (although this

In ejectionment, a special writ may be directed to the Court, signifying title in the crown to the lands demanded; and inhibiting the trial until the defendant has made his *aid-prayer*, and procured the writ *de procedendo ad judicium*.
Post. 694.

Moor, 421. 843.
1. Roll. Abr.
159. 167.
27. *H.n.* 8.
pl. 9.
28. *Hen.* 6. pl. 4.
Dyer, 101. 257.
See the notes to the 8th edit. of the *Nat. Brev.*
p. 359, 360.
Hard. 179.
1. *Com. Dig.*
292.

SALE
against
FARRINGTON.

trial is but in a personal action) that the queen may be prejudiced in her title. And by the writ, there is a recital of a title in the queen; and that this trial is prejudicial thereto, which is not reason to be tried *regina inconsulta*. And her trial of right is to be discussed in chancery, where the queen's records are to prove her title. Wherefore it is not reason we should proceed without a *procedendo*. And so they all held. Whereupon they said, it were fitting, that the plaintiff should procure a *procedendo*. Wherefore &c.

CASE 13.

• Paramour against Varrold.

Michaelmas Term, 35. & 36. Eliz. Roll 26.

To false imprisonment in London, if the defendant pleads a recovery and execution in Sandwich, and TRAVERSES the place, the plaintiff may TRAVERSE the record of the recovery.

Ante, 92.

Moor, 340.

418.

Poph. 101.

Co. Lit. 282. b.

Saund. 22.

Hob. 104.

Latw. 1438.

1630.

Carth. 99.

Cro. Car. 105.

Ld. Ray. 370.

FALSE IMPRISONMENT in London. The defendant pleaded a recovery against the plaintiff in debt, in Sandwich court in Kent: by custom, and by force of a *capias ad satisfaciendum* awarded there, he took and imprisoned him at Sandwich, ABSQUE HOC that he is guilty in London. The plaintiff for replication saith, that he imprisoned him in London, prout, &c. ABSQUE HOC quod habetur aliquod tale recordum, et hoc paratus est verificare per recordum illud, &c. And thereupon the defendant demurred in law.

First; Because he takes a traverse upon a traverse, where he ought to have maintained his declaration; as 1. Hen. 7. 21.

Secondly, Because he avers, *quod non habetur aliquod tale recordum, et hoc paratus est verificare per recordum illud*, which is a mere contrariety; for he therein confesseth, that there is such a record, which is the express case in 9. Hen. 7. where it is alledged, and held to be error.

And all THE COURT for the first held clearly, that the plea is good; for otherwise, every defendant by a false plea might draw a transitory action in what place he would, and might make the place and day alledged material; which the law will not suffer, but will rather suffer the plaintiff to traverse such a false plea without maintaining his action. And so are the YEAR BOOKS of 10. Edw. 4. pl. 2. 12. Edw. 4. pl. 6. 43. Edw. 3. pl. 23.

Quere, If a repugnant averment shall vitiate a plea, where the plea does not require an averment?

For the second point, GAWDY and FENNER held the replication to be ill; for it is merely contrary and repugnant to say, that there is no such record, and that he would aver it by the same record, and that this is matter of substance which needs not be expressed upon demurrer; for no plea is good without an averment, but it is a meer nugation; and the Court shall not have any regard thereto, if the party will not aver it: and a void averment is as no averment; and so this plea is ill.

POPHAM and CLENCH *à contra* in this point. For although the averment be void and contrariant in this case, yet the plea is here good without an averment; for it is a plea in the negative, and needs no other averment but to say, *Et hoc petit quod inquiratur, &c.* And then the other shall say, *Habetur tale recordum, et hoc paratus est verificare per recordum.* And then the defendant shall join with him, *Et prædictus defendens similiter, &c.*

But

But then PELHAM, *for the defendant*, shewed, that this action is by original writ, wherein the trespass is supposed 1. May, 34. Eliz. and in the declaration the trespass is supposed to be 20. May, 34. Eliz. so the writ supposeth the trespass to be done before it was in truth done; as appears by the declaration.

PARAMOUR
against
YARROLD.

In trespass by
original a vari-
ance between
the day in the
writ and the
day in the de-
claration is fatal.

And for this cause it was held by THE WHOLE COURT to be ill; and adjudged accordingly.

Cro. Jac. 664. Cowp. 178. Dougl. 135.

Marvin against Maynard.

CASE 14.

ACTION upon the case. Whereas he was seised of the manor of *Upton-Gray*, that the defendant, to slander his title, spake these words: "*Mr. Marvin*," innuendo the plaintiff, "hath not any title to *Upton*," innuendo *Upton-Gray*.

In slander of
title, the plaintiff
need not shew
what estate he
had; and it is
sufficient if the
words spoken
allude to the
estate, by its
usual appella-
tion.

Upon not guilty pleaded, it was found for the plaintiff, and now moved in arrest of judgment,

Ante, 197. 346.
Post. 427.

FIRST, Because he doth not shew what estate he had therein: for it may be that he hath it but *pur auter vie*, and then *cestuy qui vie* being dead, he hath not any title; he ought also to recover his damages according to his estate, &c.

1. Com. Dig. 174.

SECONDLY, The words are not spoken of *Upton Gray*, but of *Upton* only; which cannot be intended of *Upton-Gray*, and it cannot be helped by the innuendo.

But all THE COURT resolved, that the declaration was well enough; for as to the first, he needed not shew what estate, &c. for his seisin of any estate is sufficient. And therefore FENNER said, in the case of *Huddleston v. Lord Dacres* in a writ of annuity, the defendant pleaded, that he granted it unto him to be his steward; and that he was seised of the manor of *D.* and requested him to keep his court there, and he refused, &c. and exception was there taken, because he shews not of what estate he was seised: and ruled to be well enough; for peradventure it might be perilous to discover his estate.

TO THE SECOND they held, that the innuendo did sufficiently serve to shew his intent, what he meant in naming *Upton*; for it is usually known without the addition, and might be called so. Wherefore the innuendo stands well with his speaking. But if without the innuendo it could not by any intendment be taken so, it might have been otherwise.

Wherefore it was adjudged for the plaintiff.

CASE 15.

Sharplus against Hankinson.

Hilary Term, 37. Eliz. Roll.

A bond conditioned to pay
 20l. of "lawful
 " *English money*
 " which shall be
 " in the year
 " 1599, in and
 " upon 13. Oct.
 " next ensuing
 " THE DATE
 " hereof,"
 shall be construed
 ed to mean on
 13. October in
 the year 1600.
 Ante, 388.

2. Bl. Com. 381.
 1. Vernon, 30.

DEBT upon an obligation conditioned, " That if the obligor
 " payed to the obligee twenty pounds of lawful *English* money,
 " which shall be in the year of our Lord 1599, in and upon the
 " 13. Oct. next ensuing the date hereof; that then, &c." The
 defendant pleaded, that the day of payment was not yet come.
 It was thereupon demurred; and moved for the plaintiff, that the
 condition shall be construed, that the payment shall be upon the
 13. Oct. next ensuing the date of the bond, which day is past;
 and the words, " which shall be in the year, &c." shall have rela-
 tion that it shall be such money as shall be current *anno* 1599.
 —But FULLER, *for the defendant*, moved, that the words shall be
 construed, that the payment shall be upon the " 13. Oct. which
 " shall be in *anno* 1599 next ensuing:" so by this exposition
 and interplacing of the words, all parts may stand together; and
 so without doubt was the intent of the parties.

GAWDY. The condition is senseless. But he conceived, when a
 certain time of payment is expressed, that ought to stand; and all
 the residue shall be void, being repugnant. And there cannot be
 such a construction made, that " the next ensuing" shall refer to
 "*anno* 1599;" for that is certain enough without those words;
 but it shall refer to the 13. October; for otherwise the 13. October
 had not any sense: wherefore he conceived the day was past.

FENNER, CLENCH, and POPHAM, *à contra*.—FENNER held, that
 when the words in deeds be repugnant, they shall be rejected; and
 we ought to adjudge upon the other words: then here, when the
 payment is appointed to be in *anno* 1599, there is certainty enough;
 and the words, " the 13. Oct. next ensuing the date," are repug-
 nant and void; and therefore the day of payment is not yet
 come.—POPHAM. The payment shall be upon the 13. Oct.
anno 1599: for it is reasonable to construe it according to the
 intent of the parties, and as it may stand; and then it shall be
 construed, that the obligor shall pay such money as shall be cur-
 rent 1599; and that he shall pay it upon the 13. Oct. next after
 the year 1599; and the words "after the date hereof" are repug-
 nant and void. And by this exposition, all the words but " the
 " date hereof" stand. And if it should be construed to be paid
 upon the 13. Oct. next ensuing the date, it should be impossible:
 for how may a man pay money in *anno* 1593, which should be
 current in *anno* 1599, before which time peradventure the coin
 may be changed; and therefore this construction shall be received,
 whereby the day is not yet come.—CLENCH held, that it should
 be construed as FULLER had expounded it; so as all the words
 might stand by interposing and interplacing of them.—Wherefore,
 because three of them agreed against the plaintiff, but upon
 several reasons, GAWDY consented unto them, that judgment
 should be given against the plaintiff. And without further argu-
 ment it was adjudged for the defendant.

20wp. 600.

Penn against Glover.

CASE 16.

REPLEVIN. Upon demurrer, the case was, That the bishop of Rochester made a lease for years of a manor wherein were divers copyholders, with a "PROVISO, that the lessee shall not molest, vex, or put out any copyholder, paying his duties and services, *sub pœna forisfacturæ*." The bishop entered for the condition broken. The breach was assigned *in hoc*, that the defendant *vi et armis* entered upon a copyholder in a cow-house, parcel of the premises, and beat him; *et sic molestavit, &c.* And it was thereupon demurred.—And TANFIELD moved, that this was not any breach of the condition; for the molestation is to be intended of such sort, that he should oust him of his copyhold, either by often distraining, that he could not enjoy it quietly, or by some other vexations, whereby he was enforced to relinquish his possession. And it is not shewn here, that he ousted him from his copyhold; and if he entered upon his copyhold, and did not oust him, it is not any breach, and the wrong here is done only to his person, and not to his copyhold tenement.—And of that opinion were ALL THE COURT, that hereby the condition was not broken, for that molestation ought to be intended, such as should be an expulsion or molestation concerning his copyhold tenement; and there is not any breach by a *sort* done to his person, or in disturbing him in any other lands, unless they were his copyhold tenements within the manor. Wherefore, without any further argument, it was adjudged accordingly.

A condition, that the lessee shall not molest, vex, &c. any copyholder, is not broken by an entry on the premises *vi et armis* to beat him, if he do not oust him from his copyhold.

Moor, 400. 402, 8, Co. 91.
1. Roll. Ab. 430.
3. Wilton, 234.
380, 530.
1. Wood's Con. 490. 409.
1. Term Rep. 671.

Welden against Bridgewater.

CASE 17.

Hilary Term, 34. Eliz. Roll 489.

TRESPASS, quare clausum fregit VOCAT' Bear-Meadow APUD Paunchbourn, and his grass there growing, &c. Upon not guilty pleaded, it was found by a special verdict, that the plaintiff was seised of the manor of Paunchbourn, and that in the said manor there was a meadow called Wide-Meadow, containing eighty acres; whereof the place WHERE is parcel; and that from time whereof, &c. this meadow hath been divided by lot between divers persons, *pro capione fœni de herbâ inde proveniente*; and that from time whereof, &c. the plaintiff, and all those whose estate, &c. have used to have had allotted to them yearly out of the said meadow thirteen acres; which being allotted shall be called Bear-Meadow; and that the place WHERE was allotted to the plaintiff; and that the defendant entered and cut down the grass. And if, &c.—ATKINSON, for the plaintiff. The question was, Whether the plaintiff hath a profit *a prender* in that land only, or the land itself; so as he might have trespass, *quare clausum fregit, &c.* For if he hath but a profit, he cannot maintain this action, as 5. Hen. 7. 10. of him who hath a warren only in another man's soil; or 15. Hen. 7. or 14. Hen. 8. of him who is a commener only. But it seemeth here, this land being allotted unto him, he hath an interest and freehold therein for the time, and may well have this action; as Fitz. N. Br. 62, partition between coparceners, that the one shall have the manor of D. for one year, and the other the manor of S. and that every

Trespass *quare clausum fregit* lies for the portion of a common field, after the allotment, Ante, 413.

1. Roll. Ab. 829.
Co. Lit. 4. a. 48. b.
Moor, 302.
Dyer, 285.
3. Leon. 213.
1. Wood's Con. 497.
Strange, 1283.
Willf. 107.
Burr. 1824.
3. Bl. Com. 210.
5. Co. D'g. 576.
1. Burr. 137.
1. Term Rep. 430.

WELDEN
against
BRIDGEWATER

second year they shall exchange. Now each of them for their time have a several freehold, and shall have trespasss alone, *quare clausum fregit*. So *temps Ed. 1. "Partition" 21.* partition, that the one shall have it from such a day to such a day, and the other for the residue of the year (a). Wherefore, &c.—And of that opinion was THE WHOLE COURT; for it may be good by prescription; and by the allotment, it is the proper soil and freehold of him to whom it is allotted; and that he well might maintain a *quare clausum fregit*. Wherefore it was adjudged for the plaintiff.

(a) Co. Lit. 4. a.
167. a. 180. a.
1. Roll. Ab. 189.
F. N. B. 62.

CASE 18.

Sower against Bradfield.

Trinity Term, 37. Eliz. Roll

An unliquidated claim may be submitted, and if of the sum due it is awarded, viz. that A. shall pay 40s. and B. 40s. several actions may be brought.

Hob. 318.

9. Co. 78.

Noy's Max. 108

1. Bac. Ab. 123.

3. P. Will. 187.

Dougl. 690.

Cowp. 56.

DEBT for forty shillings upon an arbitrament. Whereas the plaintiff claimed from the defendant and one J. S. five pounds expended for them *pro diversis negotiis*; and they had submitted themselves to the arbitrament of Sir William Paston for it; who arbitrated, that the defendant and J. S. should pay to the plaintiff four pounds, viz. the one forty shillings, and the other forty shillings: and for the forty shillings to be paid by the defendant, he brought this action. And it was thereupon demurred.—**FIRST**, Because this is a debt certain, which ought not of itself to be put in arbitration. *Sed non allocatur*. For although a debt upon a bill or contract cannot by itself be put in arbitrament, yet this five pounds is claimed as expences *pro diversis negotiis*, and so may be well put in arbitration.—**SECONDLY**, It was alledged, that this action ought to have been joint against them both for the four pounds, and not several. *Sed non allocatur*. For the viz. makes it as several arbitraments for both. Wherefore it was adjudged for the plaintiff.

CASE 19.

Adams against Albon.

Error in the return of the *venire facias*.
Ante, 260. 388.

IT was moved in arrest of judgment after verdict, that the *venire facias* bore teste 9. July, 37. Eliz. returnable *die Mercurii proxime post tres Trinitat' proxime sequent'*, which day is not yet come; for the 9. July, 37. Eliz. is *dies Mercurii in tres Trinitat' 37. Eliz.* and the last day of the Term; and therefore the writ here is not returnable the same day, but ought to be *die Mercurii proxime post tres Trinitat'*, which is a year after. Wherefore this trial is before the day that the *venire facias* is returnable, and therefore ill; and it is not like where in a trial the *venire facias* is not returned; for that shall be intended good, a *venire facias* being awarded and returned, and that it was imbezzled, which is aided by the statute.—And of that opinion was THE WHOLE COURT at this time. *Sed adjournatur*.

CASE 20.

Fuller against Fuller.

Hilary Term, 36. Eliz. Roll 586.

If a devise be made of lands in tail with divers remainders over, and the devisee dies, leaving issue, in the lifetime of the devisor, the next in the remainder shall have the land, although the devisor had declared *viâ voce* that the issue of the devisee should have it. Ante, 243. Iyer, 304. in poss. 1. Lev. 243. 1. Vent. 341. 2. Jones, 135. Ray. 408. Glib. on Dev. do. devised

TRESPASS, for lands in Chigwell, in the county of Essex. Upon not guilty pleaded, a special verdict was found, that one Henry Fuller was seised of this land in fee, holden in socage, and had issue four sons, viz. John, Richard, Edward, and Henry, and the next in the remainder shall have the land, although the devisor had declared *viâ voce* that the issue of the devisee should have it. Ante, 243. Iyer, 304. in poss. 1. Lev. 243. 1. Vent. 341. 2. Jones, 135. Ray. 408. Glib. on Dev. do. devised

“ devised the land to *Richard* the second son, and his heirs of his
 “ body; and after his death without issue, then to *Edward* the third
 “ son in tail, and then to *John* the eldest son in tail, remainder to the
 “ right heirs of the devisor. *Richard* dies, having issue two sons,
 “ viz. *Thomas* and *William*. Afterwards *Henry* the devisor said,
 “ My will is, that the sons of *Richard*, my son deceased, shall have the
 “ land devised to their father, as they should have had if their father
 “ had lived, and had died after me.” *Henry* the devisor died.
 “ *Thomas*, the son of *Richard* entered; upon whom *John* the eldest
 “ son of *Henry* entered. *Thomas* re-enters. *John* brings trespass,
 “ Et si, &c.”

FULLER
 against
 FULLER.
 Carth. 309.
 1. Petr. Will.
 399.
 1. Strange, 25.
 4. Mod. 255.
 1. Salk. 226.
 230.
 1. Ld. Ray. 3.
 5. Ba. Ab. 512.
 Mod. Rep. 267.
 Pow. on Dev.
 486.

This case was argued by TOWSE, for the plain^{iff}, and by FOSTER, for the defendant; and two points therein moved.—First, Whether by reason of this new speech and declaration after the death of *Richard*, *Thomas* his son shall take as a devisee?—Secondly, Admitting it be not a good devise to *Thomas*, Whether *John* the eldest son shall have it during the time that any issue of the body of *Richard* be alive? or, Whether *Edward* in remainder should enter presently? because it is not limited unto him, until the death of *Richard* without issue; so as in the mean time the heir of the devisor might retain it; for if he in remainder ought to have it, then the defendant hath *primer possession*; and so the plaintiff hath not any cause of action.

GAWDY held, that *Thomas* should not take it; and that there was not any difference betwixt this and *Brett's Case* *. There the devise was in fee, here it is in tail, which is all one: and this speech of the devisor is not of any effect; for there is such a speech in *Brett's Case*; but the devise of the manor of *D.* which he had not, was good with a new publication after he had purchased it; so of a devise to an infant *in ventre sa mere* with a new publication after its birth (a); for there is his will written, “ that he
 “ should have it;” and it is expressed by his words afterwards; but here there is not any written will, that the son of *Richard* should have it; and he cannot have it as his heir. Wherefore, &c. To the second point there is no doubt, but that he in remainder shall have it presently; for the devise being void to the first, it is as if it never had been made; so it is if the first devisee refuse, he in the remainder shall have it presently; as 37. Hen. 6. Plow. 414. secundo *Mar. Dyer*, *Jasper Warren's Case*. Wherefore the plaintiff hath not any cause of action, &c.—And in this point all THE OTHER JUSTICES agreed with him; and as to the first point (b), CLENCH agreed also.

1. Int. 735.
 (*) Plowd. 345.
 Ante, 401.
 3. Ba. Ab. 124.
 1. Freem. 244.
 293.
 Fearn, 429.
 Pow. on Dev.
 325.
 1. Will. 486.
 1. Stra. 362.
 Co. 1. 101.
 2. Brown's Caf.
 Ch. 33. 68. 321.
 (b) Post. 433.
 2. Vern. 209.
 Plowd. 344.
 4. Mod. 283.
 3. Com. Dig. 7.

But FENNER and POPHAM *à contra*. FENNER held, that *Thomas* should take it by this devise; for this differs from *Brett's Case*, in the manner of the new publication; and as a devise to one who is not *in esse*, with a publication afterwards when he comes *in esse*, is good, so it is here; for it appears (as it is found) that the devisor knew well, that the heirs of the body of *Richard* should not take by descent, their father being dead; and therefore he would have them to take as they might, viz. as purchasers by the name of heirs of the body of *Richard*, although *Richard* was dead at the time of the devisor's death; and to do that, he made this new declaration of his will.—POPHAM accord. that *Thomas* the heir of *Richard* should have it as devisee by this new publication; for none will deny that if the devise had been to *Richard*, and the heirs of his body, and *Richard* had been dead at the time of the devise,

Co. Lit. 26. b.
 Mod. Rep. 267.
 2. Levinz, 243.

(a) See 11, & 12. Will. 3. c. 16.

FULLER
against
FULLER.

but that the heir should take it as a purchaser : and truly there is not any difference ; for this new publication is *quasi* a new will, as it is in *Trevilian's Case*, *Dyer*, 142. And I hold clearly, if a man hath issue three sons, and devise his land to the eldest in tail, remainder to the second in tail, remainder to the third in fee, and the eldest dieth, having issue in his father's life-time, that his issue shall have it without a new publication, because the intent of the devisor was not to disinherit any of his sons ; and it may be he did not know of the death of his eldest son, who was peradventure beyond sea, or elsewhere absent. And there is not any reason to make such a construction, as to disinherit his issue ; for by such means many may be disinherited, and the wills expounded against the intent of the devisor. But of such a devise to a stranger, it may peradventure be otherwise ; for the devisee being dead, the intent of the devisor doth not appear to carry it from his own heir to the heir of a stranger.—But for the second point, in regard they all agreed against the plaintiff, it was adjudged presently for the defendant.

CASE 21.

Charter against Hunter.

Trinity Term, 37. Eliz. Roll 1064.

Words not
actionable.

ERROR of a judgment in an action upon the case for words : “ Thou art a priggish, pilfering merchant, and hast pilfered away my goods from my wife and children.” The error assigned was, Because an action lay not for these words. — And of that opinion was THE WHOLE COURT ; for the words do not impeach him of felony. Wherefore the judgment was reversed.

CASE 22.

Bartholomew against Dighton.

Hilary Term, 37. Eliz. Roll 251.

An infant must
sue by his
guardian, and
not by attorney.
Post. 541.
3. Ro. Ab. 287.
4. Co. 53. b.
Cro. Jac. 441.
5. Com. Dig. 198.
3. Saund. 212.

ERROR upon a judgment in the common pleas, Because the plaintiff being an infant sued by attorney, and recovered, whereas he ought to have sued by his guardian. — But THE COURT upon the motion held, that in regard the plaintiff hath recovered, and it is for his benefit, and no prejudice by his appearance by attorney, that it should not be assigned for error : but they would advise. — And afterward, *Pasch.* 39. *Eliz.* being moved, it was held clearly to be error. And the judgment was reversed for that cause.

CASE 23.

Whetstone against Higford.

The king's
chaplain, tho'
appointed by
parol only, is
enabled to hold
pluralities.

1. Co. 98, 99.
Godb. 41.
Hob. 302.
Ld. Raym. 162.
3. Salk. 161.

UPON evidence to a jury the question was, Whether one might be the queen's chaplain, and have plurality of benefices by the 21. *Hen. 8. c. 13.* by being retained by *parol* only? — POPHAM held, that the queen could not retain by *parol* only. But FENNER *à contra* ; who said, there was a case in this court, wherein he himself argued, where the serjeant of the mace being made by the delivery of the mace unto him, it was held to be good. And his office being in question as being forfeited, he pleaded the queen's licence by *parol* to be absent, and not to exercise it ; and it

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was adjudged to be good; for her corporate body doth not take away or destroy the human body, but that she might retain servants, and do other acts as a common person does. And it was shewn that this chaplain died above thirty years since; and that during his life he was reputed her chaplain, and exercised the place of chaplain as well in her private closet as elsewhere; and had all the benefits as her chaplain, &c.—Wherefore THE COURT said, that it should be intended that he was her chaplain, and well and duly retained: wherefore the question being to avoid a lease made by him to the plaintiff, it was held that he was a person able to make such a lease. And the jury found for the plaintiff.

WHETSTONE
against
HIGFORD.

Germyn against Rolls.

CASE 24.

Michaelmas Term, 36. & 37. Eliz. Roll 365.

ERROR upon a judgment in the common pleas, where *Germyn* brought debt in the common pleas against *Rolls*, as executor of *Norwood*, for certain fees due unto him as attorney of the common pleas; as also for fees due unto him for soliciting causes in the queen's bench, as also for money expended about a fine for alienation. The defendant pleaded *nunques executor*, &c. and found against him; and judgment for the plaintiff; and *Rolls* brought his writ of error.—And the error assigned was, Because this action of debt lieth not against an executor; for although it lies against him for an attorney's fees, because the testator could not have waged his law for them, in regard he was compellable to expend them; yet forasmuch as it is brought for fees in soliciting suits in the queen's bench, where he was not attorney, for which an action lies not against an executor; then having conjoined them, and damages entirely given, the judgment is therefore erroneous in all (a).—And it was agreed by THE WHOLE COURT, that the action lay not for part against the executor, and that the conjoining of them hath made all ill, so as he might have demurred upon it, and have abated the writ: But if by his plea he having admitted it, he hath now made it good? was the question. For it was said, that the reason why this action lies not against an executor is, because the testator might have waged his law; and an executor by intendment cannot have consuance thereof: but when he takes upon him notice thereof, and admitted that there was such a contract, then he may be well charged, as 10. Hen. 6. pl. 25. 13. Edw. 3. tit. "Executor." And so 2. Edw. 4. account lies not against an executor; yet if he upon account brought against him enters into the account, and be found in arrear, action of debt for this account lies against him.—GAWDY. The judgment is erroneous, for this writ of itself lies not against an executor; and the admittance of the party shall never make a writ, which of itself is ill, to be good; but the Court shall adjudge it according to law. As 10. Edw. 4. trespass against the lord *vi et armis*, and he admits it, yet the Court shall abate the writ. So 28. Hen. 8. pl. 13. debt is brought for a rent service, which hath continuance, although the defendant admits it, the Court shall abate the writ.—FENNER *contra*. For this is not such an action which lies not against an executor of itself, but it lies not by reason he is not privy to the contract, and he could not have notice thereof.

An action of debt will not lie against an executor upon a simple contract with the testator, and the Court shall *ex officio* abate the writ, although the defendant by his pleading has admitted the contract. Vide post. 459. and *quere*.

1. Roll. Abr. 924. 929.
2. Roll. Abr. 107.
- Moor, 366.
1. Saund. 286.
- Cro. Car. 107.
159. 194.
- Cro. Jac. 521.
- Cont. 9. Co. 87.
10. Co. 77.
- Vaugh. 101.
1. Lev. 200.
- (a) Noy, 117.
2. Leon. 178.
2. Sid. 57. 94.
2. Roll. Rep. 156.
- Carth. 235.

GERMYN
against
ROLLS.

Post. 471.

Ante, 321.

thereof. But if his ignorance is taken away, and he may have notice thereof, the law will charge him. As 46. *Edw. 3.* debt was brought against an executor for a servant's wages; and because that he himself retained the servant for the testator, so as he thereby had confuſance, it was held that he should be charged; otherwise not: so here, because by his plea he takes notice thereof, and admits it by an implicit confession, the action well lies. Wherefore, &c.—*POPHAM*. I agree that if in debt upon a simple contract, the executor confesses the action, or pleads *nihil debet*, judgment shall be given against him; because in the one case upon the trial the truth of the debt appears; and in the other case he by his plea confesseth it; but yet in respect the testator might have waged his law, or pleaded *nihil debet*, and the one way is taken from the executor to discharge that debt, he shall not be charged and enforced to plead if he will not: but I doubt here whether by this plea the contract be confessed. And therefore a case hath been cited to be adjudged in the common pleas, 30. *Eliz. Huson v. Webb*, that in debt against an executor upon a single contract, who pleaded *pleni administravit*, and found against him, yet no judgment could be against him; but the judgment was against the plaintiff, which is all one in the reason with this case: therefore it is good to see the record thereof (a).

(a) It was moved again, and the Judges being of the same opinion, the judgment was reversed, post. 459.

CASE 25.

Shaw against Tompson.

The wife of a copyholder intituled to dower may recover the value in damages in the court baron, although they exceed 40s.
1. Ro. Ab. 601.
Moor, 559.
Noy, 129.
2 Com. Dig. 509.
Co. Lit. 33.
3. Fac. Ab. 123.
Gilb. Ten. 221.

DEBT for fifty pounds recovered in a court baron. The case was, That a *feme* recovered dower of a copyhold according to the custom of the manor by *plaint* in a court baron; and for that her *baron* died seised, she recovered by judgment there, fifty pounds damages; and for that fifty brought this action; and declares upon all this matter. It was thereupon demurred. And the sole question (as *TANFIELD* moved it) was, Whether she might recover damages to fifty pounds there, where they cannot hold plea above forty shillings?—But the *WHOLE COURT* held, that the damages were well awarded; and that she might well recover so much there; for as they may hold plea of the land, so for the damages as far as the demandant is dammified, and shall be well allowed (a). *Sed adjournatur*.

(a) It was also determined the *DEBT* would not lie in *B. R.* on the judgment; but that the remedy is in the manor court or in chancery. 4. Co. 306. See the statute Merton, c. 1. *de Viduis*, &c. Moor, 410.

CASE 26.

Atwood against Ballard.

To what place the *viens facias* shall be awarded.
Vide ante, 260.
Post. 472. 893.
Cro. Jac. 599.

TRESPASS for his close breaking. The defendant justifies by reason of a way by prescription from his franktenement in *D.* unto the vill of *S.* in the same county; issue was taken *de injuria sua propria*, &c. and a *venire facias* awarded from the *visne* of *D.* only; and thereby it was tried, and found for the plaintiff. And it was now moved in arrest of judgment, that it was a mis-trial; for the *visne* ought to have been awarded from *D.* and *S.*—*GAWDY*. True it is, if the prescription to have a way had been traversed; and so it hath

hath been adjudged here: but by this replication the way is confessed; and it may be that he breaks his close without using the way, for the way is not in question. And of that opinion was POPHAM. But FENNER and CLENCH *à contra*: and therefore it was adjourned. *Vide* 13. Hen. 7. pl. 13. 21. Hen. 6. pl. 22. 34. Hen. 6. pl. 15. 10. Edw. 4. pl. 10.

ATWOOD
against
BALLARD.

Bragg *against* Banning.

CASE 27.

Hilary Term, 37. Eliz. Roll 1004.

ACTION upon the case. And declares, Whereas he and all those, &c. have had a way from his house in *D.* over *Green-Acre* in *S.* and over *Black-Acre* into such a place in *P.* that the defendant had stopped his way in *S.* Upon not guilty pleaded, it was found for the plaintiff.—And it was alledged in arrest of judgment, that the declaration was not good, because he alledgeth not in what vill *Black-Acre* was; for if the prescription be traversed, the *venire facias* shall be from every vill where the land is over which the way lies: and so it was adjudged in 33. Eliz. *Hauk-burff's Case* in the common pleas. Wherefore, &c.

From what
place the *viſus*
shall come.
Vide ante, 260.
note (4) pl. 46.
Post. 619. 751.

GAUDY. It is clear, that this is a fault for which the defendant might have demurred; for true it is, he ought to have alledged all the lands through which he is to have his way, and vills where they lie; and if the prescription be traversed, the *venire* shall be from every vill. But now when he pleads not guilty, the *venire* shall be from the vill, where the stopping is alledged; for the way is not principally in question, but it ought to be proved upon the evidence.—And thereto all THE JUSTICES agreed. Wherefore it was adjudged for the plaintiff.

Vide 4. & 5. Ann. c. 16. and 24. Geo. 2. c. 12.

Pennyman *against* Rabanks.

CASE 28.

ACTION upon the case for slander of his title. For that he said to *J. S.* who was in speech to buy the plaintiff's land, "I know one that hath two leases of his land, who will not part with them at any reasonable rate," *ubi revera nulla talis dimissio facta fuit*. The defendant justifies by reason of two several leases by parol made unto himself. The plaintiff replies *de injuria sua propria absque tali causa*. Issue was joined, and found for the plaintiff.—It was now moved in arrest of judgment, that an action lay not for these words; for he doth not say, that any had leases for years, but it might be well intended of leases at will, which are not any prejudice. *Sed non allocatur*; for it cannot be intended that he spake of leases at will, because he mentions leases grantable over, and also such as shall prejudice the purchaser. Wherefore, &c.—**SECONDLY**, The declaration is not good, because he concludes, *ubi revera nulla talis dimissio*, &c. whereas there be two leases mentioned, and this conclusion goes but to one, which is uncertain. *Sed non allocatur*; for *dimissio est nomen collectivum*, and comprehends both leases. As 15. Eliz. 325. "*Assise*," the plaintiff made two titles to two bars, the tenant saith, *Veign le Assise sur le title*, that goes to both. Wherefore, &c.—**THIRDLY**, Because it appears by the defendant's justification, that he intended of leases made of himself;

Slander of title.
Moor, 410.

Ante, 333.

and

PENNYMAN
against
RABANKS.
Ante, 197.

and if a man claim estates, although they be false he shall not be punished. This was agreed by all THE COURT, that no action lay against one for saying, that he himself had title or estate in lands, &c. although it were false. But here the words in the declaration, as they are spoken, being in the third person, be not intendable of himself, but of some other, and import a slander to the plaintiff's title; and then his justification afterwards shall not take away that action which before was given to the plaintiff for the slandering of his title.—Wherefore rule was given that judgment should be entered for the plaintiff, unless other matter was shewn upon the third day of the next term.—Afterwards *Pasch.* 38. Eliz. it was adjudged for the plaintiff, FENNER *contradicente*.

CASE 29.
(a) See Ld. Ray.
260.

An indictment for perjury must shew that the subject matter of the oath was material to the cause in which the perjury was committed.

Raym. 202.
Cro. Car. 351.
1. Keb. 452.
3. Hawk. P. C.
ch. 69. s. 23.
Doug. 156.
1. T. Rep. 69.

The Queen against Bowles (a).

ONE was indicted upon the 5. Eliz. c. 9. of perjury, for that there was a suit in chancery betwixt one *Marshal and Harvie*, for the manor of *Staverton*, in the county of *Devon*, and a commission was thereupon awarded to examine witnesses; that the defendant swore, the deed of the feoffment of the manor (*manerium prædictum innuendo*) was delivered as an escrow to be delivered, &c. *ubi revera* it was delivered absolutely, &c.—The first exception was, That this oath, that the deed of the manor was delivered as an escrow, &c. is not material, unless it be shewn that it concerned the manor in question; for otherwise, although it were false, it is not punishable, neither by action nor by indictment upon the statute. For the statute is, "If a witness depose falsely concerning any cause, &c." for which false oath he is not punishable by this statute, unless it be shewn or averred how this concerns the cause.—And of that opinion was THE WHOLE COURT: and although it is alledged, *manerium prædict. innuendo*, yet it shall not help it; for a man shall not be punished as a perjuror by an *innuendo*. Wherefore for this cause only the indictment was discharged.

CASE 30.

Castleman against Hobbs.

Hilary Term, 37. Eliz. Roll 334.

An *innuendo* cannot alter the common intendment of the words spoken by the addition of a new fact.
Moor, 396.
Gwen, 57.
Cro. Jac. 205.
4. Bac. Ab. 51.
1. T. Rep. 70.

ACTION upon the case for these words: "Thou art a thief, "for thou hast stolen half an acre of my corn," *innuendo* "the corn growing upon half an acre of ground reaped and put into shocks by the defendant." Upon this declaration the defendant demurred.—And upon the first motion, without much arguing, it was adjudged for the defendant; for the stealing half an acre of corn cannot be said to be felony; for it shall be taken in common parlance and intendment, corn growing upon the land which the plaintiff cut down and carried away; and the *innuendo* helps nothing, unless the words precedent have a vehement presumption of the *innuendo*: and herein no man will intend that it was corn severed, when he saith "half an acre of my corn." Wherefore it was adjudged for the defendant.

Reynolds

Reynolds against Pinhowe.

CASE 31.

Trinity Term, 37. Eliz. Roll 337-1

ASSUMPSIT. Whereas the defendant had recovered five pounds against the plaintiff; in consideration of four pounds given him by the plaintiff, that the defendant assumed to acknowledge satisfaction of that judgment before such a day; and that he had not done it. And it was thereupon demurred: for it was moved, that there was not any consideration; for it is no more than to give him part of the money which he owed him, which is not any consideration.—But all THE COURT held it to be well enough; for it is a benefit unto him to have it without suit or charge: and it may be there was error in the record, so as the party might have avoided it. Wherefore it was adjudged for the plaintiff.

Assumpsit will lie on a promise to acknowledge satisfaction on record, in consideration of 4l. paid by the plaintiff for a debt of 5l. which the defendant had recovered against him.
Post. 538.

1. Roll. Ab. 28. Moor, 412. Cro. Car. 8. Sed vide Cowp. 128.

Woodroff against Vaughan.

CASE 32.

Michaelmas Term, 36. & 37. Eliz. Roll .

ACTION. For that he spake in the presence of one Lumley these words of the plaintiff: "I did not know that WOODROFF," *innuendo* the plaintiff, "was thy brother: he hath forsworn himself; and I will prove him perjured, or else I will pay him his charges."—After verdict upon not guilty pleaded, and found for the plaintiff, it was moved in arrest of judgment, Because it is not averred that Lumley was brother to the plaintiff; and therefore it shall not be intended as spoken of the plaintiff, as it was agreed this Term in *Badcock's Case* (a). *Sed non allocatur*; for when it is alledged to be spoken in the presence of one only, it cannot be intended but that it was the plaintiff, if the other *revera* be his brother; and therefore it may be well helped by the *innuendo*: but otherwise it is where it is spoken in the presence of divers others, as in the case alledged.—Secondly, It was moved, that for these words an action lay not; for, for the words "he hath forsworn himself," an action is not maintainable; which was agreed *PER CURIAM*.—Then for the words, "I will prove him perjur'd, or else I will bear his charges," no action will lie. But THE WHOLE COURT resolved to the contrary; for it is as great a slander as if he had said directly that he was perjured: and it is not reason that by such colourable addition to slanderous words, the party should be without remedy. Wherefore it was adjudged for the plaintiff.

"I will prove him perjured," are actionable words; and if spoken in the presence of one person only, as of that person's brother, an *innuendo* will ascertain it to be the plaintiff.

(a) Ante, 416.
1 Roll. Ab. 39.
Moor, 365.
2. Jones, 5.
1. Com. Dig. 179.

Whitbie against Marshall.

CASE 33.

EJECTIONE FIRMÆ, as lessee of Mr. Gray, for lands in Langley, in the county of Leicester. At the *nisi prius* in the country, six of the jurors were challenged and *treited*, and the jury remained *pro defectu juratorum*. At the next assizes a new *distringas* was awarded against all the first jurors, as well those who were *treited* before as the others; and at the *nisi prius* in the country, the issue was tried by some of the jurors of the ancient panel, and by others returned upon a *tales de circumstantibus* awarded; but none of them who were *treited* before tried it. The verdict was found for the plaintiff.—And it was now alledged in arrest of judgment, that this *distringas* was ill awarded; for it ought

A second *distringas* awarded against jurors who had been challenged and withdrawn from a former panel in the same cause, is a default helped after verdict.
Post. 430.

WHITBIE
against
MARSHALL.

bought not to have been awarded against them who were *treited*, but against the others only; and then the trial thereupon was ill.—But THE COURT held, that in regard it was but a judicial process, which being awarded against them where it ought not to be, is but the default of the Court, and shall not turn the plaintiff to prejudice. It was a good trial by the common law, in respect the trial was by the lawful jurors; as also clearly by the statute of jeofails, which helps mis-awarding process. Wherefore it was adjudged for the plaintiff.

CASE 34.

Moor against Vaughan.

It is a mis-trial if any juror who has been challenged by the parties, afterwards tries the cause.

Ante, 429.

TRESPASS. At the *nisi prius* the jurors were challenged, and the jury remained *pro defectu jurator*.; and afterwards a new *distingas* with a *nisi prius* was awarded against the same jurors who were *treited* before; and some of them who were *treited* appeared and tried it. And this matter was alledged in arrest of judgment.—And held clearly by all THE JUSTICES, that it was a mis-trial, and not aided by any of the statutes of jeofails. Whereupon a *venire facias de novo* was awarded to have a new trial.

CASE 35.

Sir Edward Denny against Eakenstall.

Hilary Term, 37. Eliz. Roll 882.

The glebe of an archdeaconry is not any part of the possessions of the bishoprick; and a lease by the archdeacon made before 13. *Eliz.* will bind his successors, tho' it be not confirmed by the bishop until after 13. *Eliz.* c. 10.

Ante, 13.

Moor, 636.

Co. Lit. 300. b.

5. Co. 15.

Cro. Car. 38.

Cro. Jac. 53.

3. Bac. Ab. 389.

EJECTIONE FIRMÆ. Upon a special verdict it was found, that the archdeacon of *Ely* having the parsonage of *Haddon* appropriated to his archdeaconry, anno 12. *Eliz.* let the land in question, being parcel of his glebe, for fifty years. The bishop of *Ely*, being patron of that archdeaconry, and the dean and chapter of *Ely*, anno 15. *Eliz.* confirmed that lease. The archdeacon dies; the bishop collates to that archdeaconry *J. S.* who enters, and let the land to the plaintiff. *Et si, &c.*

The first question moved was, Whether this confirmation by the bishop be not void by the statute of 1. *Eliz.* c. 19. which makes all grants and assurances, &c. by a bishop more than estates for twenty-one years, or three lives, to be void? *Et si sic*, the lease made by the archdeacon is void against his successor.—But all THE COURT held, that the statute doth not extend thereto; for that statute is intended of grants of lands, tenements, and hereditaments, parcel of the possessions of the bishoprick, &c. But here the confirmation passeth not any estate, but it is an assent only to the lease of the possession of the archdeaconry, and not of the bishoprick; for it is not the alienation of the patron, and therefore not within the statute: but otherwise it is where a bishop is disseised, and confirms it to the disseisor. Wherefore, &c.

Secondly, It was moved that this lease is void by the statute of 13. *Eliz.* c. 10.; for the confirmation after the statute shall not bind the successor, although the lease made before the statute shall bind him who made it.—But THE COURT thereto delivered not any opinion. *Sed adjournatur.*

Anonymous

Anonymous.

CASE 36.

COKE, the Queen's Attorney, demanded of the Court their opinion in this case. A man having two daughters, being his heirs, deviseth his land to them and their heirs, and dies: Whether they shall take as jointenants by the devise, or as coparceners by descent? —And all THE JUSTICES held clearly, that they shall have it as jointenants; for the devise giveth it them in another degree than the common law would have given it them, and for the benefit of the survivorship between them.

Female heirs to whom land is devised shall take as jointenants, and not as coparceners. Ante, 7. off. 695.

S. C. Owen, 65.

1. Leon. 315.

1. Salk. 342.

3. Lev. 127. 1. Cr. 161. 2. Sid. 53. 780. Gouldf. 141. Comyn's Rep. 123. 2. Ld. Ray. 830.

Doyle against Wood.

CASE 37.

Trinity Term, 36. Eliz. Roll 128.

TRESPASS. The defendant justifies as in his freehold. The plaintiff makes title, that this land is parcel of the manor of D. and demisable, time whereof, &c. by copy in fee, in tail, or for life, or for lives, &c. and that this land was let unto him by copy in fee. The prescription was traversed, and found that it had been demised and demisable, from time whereof, &c. in fee, but never in tail; and that it was granted to the plaintiff in fee.—It was thereupon held by THE WHOLE COURT, that it was found for the plaintiff. For the allegation that the land had been demisable in fee or in tail, &c. is but a conveyance to his title: and forasmuch as it was found that it was demisable in fee, and that it was demised unto him in fee, that is the effect and substance of his title which is found for him, and sufficient. Wherefore the plaintiff had judgment to recover.

A prescription that land is demisable in fee or in tail is good, though in fact it was not demisable in tail, provided the title to it be in fee.

Ante, 41. 415.

Moor, 359.

Cowp. 4.

Stafford against Bateman.

CASE 38.

Hilary Term, 37. Eliz. Roll 118.

TRESPASS upon demurrer. The case was, That by virtue of a fieri facias out of the exchequer for the queen's debt, the defendant took the plaintiff's beasts, being levant and couchant upon the land of the debtor, and sold them for the queen's debt.—And adjudged that it was not lawful; for they were not to be sold as the goods of the debtor, but they might have been distrained for the queen's debt. Wherefore, &c. (a).

The cattle of a third person levant and couchant upon the lands of the queen's debtor cannot be sold for such debt under a fieri facias, but may be

distrained. 2. Com. Dig. 646. 2. Roll. Ab. 159. Salk. 395. Skin. 618. Comb. 469. Ld. Ray. 305. 308. 12. Mod. 178. Carth. 444.

(a) This is not law. L. C. B. PARKER'S MSS.

Morgan against Williams.

CASE 39.

Michaelmas Term, 36. & 37. Eliz. Roll 319.

DEBT, as administrator to one Philips. And declares, That administration of the goods of Philips were committed per Andream Vane, sacre theologie doctorem, such a day apud Monmouth, and the plaintiff recovered in the common pleas by default; and writ of error was thereof brought. The error assigned was, Because it is not shewn that Vane was ordinary of Monmouth, nor that the committing of administration appertained unto him.—And in regard it was in a declaration, which ought to be certain, and he is not a bishop, nor any person who may be intended to be the ordinary, the judgment was therefore reversed.

A suit on an administration granted by a peculiar, must shew that he was ordinary. Ante, 102.

Post. 791.

Moor, 367.

1. Lut. 408.

Cro. Jac. 556.

1. Sid. 228.

Show. 355. 4. Mod. 133. Skin. 551. 2. Bac. Ab. 442. 5. Com. Dig. 207. 1. Salk. 3841.

CASE 40.

Samon against Pitt.

Trinity Term, 36. Eliz. Roll 877.

An award that the defendant shall enter into a bond, without naming what sum; and that he and his wife (the not being a party to the submission) should have the lands in controversy, is void for uncertainty in the first case, and repugnancy in the second.

Ante, 4.

Post. 726.

5. Co. 77. b.

1. Roll. Ab. 243.

Moor, 359.

Brownl. 92.

Roll. Rep. 271.

Dy. 242.

Yelv. 78.

Cro. Jac. 314.

Lev. 88.

Sid. 270.

Style, 365.

2. Saund. 292.

6. Mod. 231.

244.

Salk. 76. 498.

Skin. 248.

Ld. Raym. 1076.

1078.

Burr. 277, 278.

2. Bac. Ab. 35.

ASSUMPSIT. And declares, Whereas there were divers controversies between the plaintiff and defendant concerning divers lands in *D.* whereupon they submitted themselves to the arbitration of *J. S.*; that the defendant assumed, in consideration of sixpence, to perform such award as *J. S.* should make; and alledged, that *J. S.* awarded that the defendant should enter into a bond to the plaintiff, that the plaintiff and *Elizabeth* his wife *habere*nt et *gauderent* all the lands in controversy excepting seven acres; and for non-performance of this arbitrament the action was brought. Upon this declaration it was demurred in law; and it was argued for the defendant, that this award was void.—First, Because it is awarded that he shall enter into bond: and it is not set down in what sum he should be bound; so he knows not how to perform it: and if he should enter into bond without a sum, it were void; and the arbitrament being void, the defendant is not bound to perform it.—Secondly, The award is void in this, that they awarded he should be bound that the plaintiff and his wife should enjoy, &c. and the wife is not party to the submission, nor is to have any benefit by the award; for the arbitrators have not any power to award a thing to be done to a stranger.—But *TANFIELD*, for the plaintiff, moved, that the award was good, notwithstanding these exceptions. For as to the first, although it be not shewn in what sum the defendant shall be bound, yet he is to tender an obligation in some sum; and it is at his election in what sum he will be bound, be it never so small. And as to the second, the arbitrament is good; for although it be void as to the *feme*, because she is not a party to the submission, yet to be bound that the *baron* shall enjoy it is good as to him; as 18. *Edw.* 4. 22. and 19. *Edw.* 4. that the party and a stranger as his surety shall be bound, it is void as to the stranger, but is good as to the party, and he himself ought to enter into the bond.—But as to the first, all THE COURT held it to be a void arbitrament; for the arbitrators are absolute judges, and therefore ought to decide absolutely and certainly what shall be done: and they cannot give their authority unto us, or to the party to make certain their uncertainty, no more than they may make an award that *J. D.* shall make an award between the parties, for their authority is not transferrable; and therefore this award being uncertain is void, and the parties are not bound to perform it.—But *POPHAM* and *FENNER* said, that if he ought to enter into any bond, it ought to be in a sum according to the value of the profits of the land; and therefore if *A.* covenant to enter into bond for the enjoyment of such land, without naming any sum, it ought to be the sum according to the value of the land (*a*): as 8. *Aff.* an annuity is granted to a man until he be promoted to a benefice, he need not accept a benefice of a lesser value than the annuity.—And *POPHAM* held the arbitrament to be void for the second cause; for it being an entire thing that was appointed to be done, being void in part, it is void for the whole: but otherwise it is where he appoints two things to be performed, and the one is within the submission, and the other not, and they are awarded to be performed severally, it is good for that which is within the submission, and void for the other. But to

(a) Samon's Case, 5. Co. 78.

this

this point, none of the other Justices spake. But for the first cause principally without other argument it was adjudged for the defendant. 5. Co. 77. b.

SAMON
against
PITT.

Sir Christopher Hilliard *against* Constable.

CASE 41.

Vide Ante, Page 306. Case 5.

ACTION for words was now moved again.—GAWDY and FENNER held, that for the words, "He is a blood-fucker, and sucketh others blood," (for all the other words, ALL THE JUSTICES agreed that they were not actionable) the action lies not; for they are not words which of themselves import any defamation; for it is usual when a justice of peace pursues offenders, and does his office, to call him "blood-fucker"; and it is not any slander unto him, and may be taken in some good sense in executing his office, and not *in malam partem*, that he is a blood-fucker in seeking murder or otherwise.—POPHAM and CLENCH *contra*; for it shall be construed according to the common intendment of the word, which is always *in malam partem*; and to suck blood is to take blood unjustly from a person. Wherefore, &c.—Afterwards the same Term at *Serjeants Inn*, before all the Justices of *England* there assembled, this case was moved, and the greater part of them resolved, that the action lay not (but I heard not their particular reasons). Wherefore the next day by the assent of POPHAM and CLENCH, it was commanded, that judgment should be entered for the defendant.

"He is a blood-fucker, and sucketh others blood," are not actionable, though spoken of a justice of peace.
S. C. Ante, 306.
1. Roll. Ab. 57.
Moor, 413.
3. Will. 124.
2. Bl. Rep. 751.
791.

Sir Walter Hungerford *against* Veisey.

CASE 42.

Easter Term, 37. Eliz. Roll 249.

ERROR upon a judgment in the common pleas. The error assigned was, Because the *venire facias* was awarded upon the roll returnable *die Mercurii proxim. post Crastin. Trinitatis*: but the writ itself was returnable *die Veneris proxim. post Crastin. Trinitatis*, which was the first day, and therefore erroneous, because the writ by the roll was returnable out of Term.—And it was held clearly to be erroneous; for the roll is that whereto the Court gives credit, and not to the writ: for if the writ were ill, it should be reformed by the roll, and that was clearly erroneous at the common law, as appears 7. Edw. 4. pl. 15. 2. Rib. 3. pl. 11. 4. Eliz. 211. and it is not aided by the statute. But if it doth not appear that any writ was awarded, it is aided by the statute, but not an ill writ. *Sed adjournatur.*

If process be awarded on the roll returnable out of term, the error is not aided by the verdict.
Ante, 340.
Post. 572. 613.
622.
Moor, 402.
465
1. Roll. Abr. 204.

Afcue *against* Sanderfon.

CASE 43.

Easter Term, 37. Eliz. Roll 218.

ACTION upon the case, *sur trover* of 300 sheep, the 1. Dec. 36. Eliz. The defendant pleaded, that he was sheriff of the county of *Lincoln*, and that J. S. recovered against the plaintiff 100l. and thereupon had a *fieri facias* to levy that debt, which writ was returnable *Crastino Animarum* 35. Eliz. That this was delivered to him, being then sheriff of the said county, upon the 1st of Oct. 35. Eliz. to be executed. That he by force thereof, upon the 20th Oct. 35. Eliz. took the said 300 sheep, and sold upon the 22d Oct. 35. Eliz. 104 sheep for 40l. parcel of the said 100l. and that the other 192 sheep remained in his hands *pro defectu emptorum*.

CRO. ELIZ. PART I.

F f

rum.

Assue
against
SANDERSON.

Post. 435.
Post. 555.
Ante. 146. 268.
Yelv. 198.
Litch. 185.
Salk. 654.
Ld. Raym. 393.
5. Com. Dig.
219.
Post. 439.

rum, And at the said day of *Crafin. Anim.* he returned the said writ accordingly, and all this matter; which is the same conversion, ABSQUE HOC that he converted them *aliter vel alio modo*. It was thereupon demurred.—After argument, the whole Court held the plea to be insufficient.

FIRST, and principally, Because he doth not by his plea confess any conversion, and then the traverse is ill: but he ought upon this matter to have pleaded not guilty, and have given it in evidence.

SECONDLY, Because the declaration supposeth the trover and conversion to be the 1st Dec. 36. Eliz. and he justifies the conversion in *October, 35. Eliz.* so he meets not with the plaintiff in time; and therefore he ought to have traversed it: and the traverse *aliter vel alio modo* shall never answer to the time, but to the manner of the conversion.

THIRDLY, He makes not any justification for four of the sheep, but that he seized them: but he shews not what he did with them: wherefore the plea doth not answer all that which is comprised in the declaration, and for that cause is ill in all. And of that opinion was ALL THE COURT, and appointed judgment to be entered for the plaintiff; but after caused it to be stayed for the equity of the matter.

CASE 44.

Staughton against Newcomb.

Michaelmas Term, 35. & 36. Eliz. Roll 381.

Variances between the original and the declaration is fatal.
1. Saut. 27. 28.
Cowp. 178.

ERROR upon a judgment in debt in the common pleas. The error assigned was, Because the record is, *quod obtulit se in placito debiti de 10l.* and when he declared, he declared for a debt of 20l.—And it was held to be a manifest error.

CASE 45.

Johnson against Pays.

An action by bill lies on the 5. Eliz. c. 9. by the party grieved, notwithstanding
18. Eliz. c. 5.
Post. 645.
Ante. 76.
3. Leon. 257.
1. Roll. Ab. 536.
3. Inst. 125.
and see note (a)

BILL OF DEBT upon the 5. Eliz. c. 9. of perjury. After verdict it was moved in arrest of judgment, that by the 18. Eliz. c. 5. no suit shall be upon a penal statute, but by information or original action; so this bill is not maintainable. But it was there-to answered, that in the same statute is a proviso, where the action is given to the party grieved, and not to him who will sue generally that he may sue as before.—Wherefore, upon view of the statute, it was held to be maintainable, and adjudged for the plaintiff.

Cro. Car. 603. 2. Hawk. 381. 2. Ld. Ray. 1333. 5. Burr. 2722. Cowp. 429.
Leigh v. Kept, 3. T. Rep. 365.

CASE 46.

Stile against Butts.

Trinity Term, 37. Eliz. Roll 159.

A commoner who has right to dig and take clay cannot justify taking that which another has dug, tho' he is no commoner.
1. Roll. Ab. 567.
Moor, 411.
Cro. Jac. 256.
3. Lev. 323.
2. Ter. Rep. 391.

TRESPASS, for carrying away thirty loads of clay in *Brookbank-Green*, digged there by the plaintiff. The defendant pleads, that he is a tenant and inhabitant in *Brookbank*, whereof the said place called *Brookbank-Green* is parcel; and that there is a custom there, that every tenant and inhabitant there may dig, have, and carry away clay in *Brookbank-Green* for his necessary use; and that the plaintiff, not being a tenant there, *de son tort & mesme* digged that clay, and laid it upon the land; wherefore he took it for his necessary use, as lawful it was for him to do; and it

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was thereupon demurred.—And upon the first motion, without any argument, THE COURT held the justification to be ill. For by the prescription it appears, that the tenant might dig and have clay; then he cannot have but what he himself digs, and he shall not have that which is digged by a stranger; for it is reasonable he should have what himself digged, but it doth not warrant him to take what another hath digged, who peradventure did it lawfully by the lord's licence. This is also like to common, which appertains not to the tenant, nor is his until it be taken by the mouth of his cattle; and if a stranger there cuts the grass, the commoner cannot carry it away, nor have his action of trespass, &c. no more here. Wherefore it was adjudged for the plaintiff.

John Vita against James Vita.

Michaelmas Term, 36 and 37. Eliz. Roll 265.

ERROR upon a judgment in Ipswich, in debt for twenty pounds, by John Vita against James Vita. The defendant pleaded *nihil debet, et de hoc ponit se super patriam*; and the issue was entered, *et prædictus Jacobus similiter*, where it ought to have been *Johannes*; and tried; and adjudged for the plaintiff. And this was the error assigned.—And ALL THE COURT held it to be amendable by the 8. Hen. 6. c. 12. which gives authority to amend records removed out of the common pleas by error for faults which happened *per vitium scriptoris*, or by the clerk's negligence: and this statute extends as well in equity to the records of other courts, which are not removed for error. Whereupon it was awarded to be amended, and the judgment was affirmed.

CASE 47.

On *nil debet* pleaded, if the entry is, *et prædictus defendens similiter*, instead of *prædictus querens*, it shall be amended. Ante, 79. Post. 752. 904. 8. Co. 159. a. Cro. Jac. 67. Salk. 49. 1. Bac. Abr 108. 1. Ter. Rep. 783.

1. Stra. 551, 642.

1. Ter. Rep. 783.

Dee against Bacon.

Easter Term, 37. Eliz. Roll 472.

ACTION upon the case, upon trover and conversion of goods. The defendant justifies the taking of them *damage feasant*, *ABSQUE HOC* he converted them *aliter vel alio modo*. And it was thereupon demurred in law; for the traverse is not good, because he confesseth not any conversion; the plea also amounts to a *non culp.*—Wherefore without argument it was adjudged for the plaintiff.

Ant. 146. 434. Hob. 187.

The justification of *damages feasant* in trover, without confessing conversion, is bad; and amounts to the general issue.

CASE 48.

Perkins against Clark and Cleydon.

ASSUMPSIT. The case was, A man devised his land to be sold by J. S. his executor. J. S. sells it for forty pounds, and dies intestate before his receipt of the forty pounds. Administration of the goods of the first testator was committed to the plaintiff. Whether he should have an *assumpsit* for this forty pounds, or had any other remedy, was moved by SPURLING, *serjeant*.—GAWDY. It is a good case; for the money, if it be recovered, is assets in their hands: but he conceived the administrator should not have an action to recover it. And CLENCH thereto agreed: but the other Justices would not deliver any opinion, but said it was fitting to consider thereof.

Went. 148. Yelv. 33. 34. 1. Jones, 214. 248. Moor, 4. 139. 686. O. Bend. 2. pl. 5. N. Bend. 18. pl. 24. Cro. Jac. 394. Cro. Car. 167. 227. 451. 2. Saund. 149. 1. Roll. 890. 907. 1. Sid. 29. March. 9. 1. And. 23. 1. Com. Dig. 251. Ld. Ray. 1049.

By 25. Edw. 3. c. 5. executors of executors shall have actions of debt and goods of the first testator in the same manner as the testator himself, and shall answer to others as the first executor should do. And by 17. Car. 2. c. 3. an administrator *de bonis non*, &c. may sue a *scire facias*, and take out execution on a judgment obtained by his intestate. See also 8. and 9. Will. 3. c. 10.

CASE 49.

An executor sells goods of his testator, and dies before he receives the money.—*Quære*, what remedy an administrator of the first testator shall have to recover it?

Went. 148.

18. pl. 24. 29. March. 9.

CASE 50.

Rofs against Morris.

If an *assumpsit* be alledged in the "county *aforsaid*," it shall be taken to relate to the county named in the margin, if the next antecedent county named be only by way of recital.

Ante, 311.
Post, 465.

Cro. Jac. 56.
618.

2. Vent. 372.
3. Wils. 339.

ASSUMPSIT brought in *Suffolk*. And declares, *quod cum prosecutus fuit un brief de subpoena* out of the chancery *apud Westm. in comitatu Midd.* and intended to serve it; the defendant *apud Hepworth in comitatu prædict.* assumed, that if he would not serve the writ that he would give him so much, &c. Upon *non assumpsit* pleaded, and found for the plaintiff by a jury of *Suffolk*, it was now moved in arrest of judgment, that it was a mis-trial: for although *Suffolk* was in the margent, yet the chancery *apud Westm. in comitatu Midd.* is last named in the record; then when the *assumpsit* is alledged *apud Hepworth in comitatu prædict.* this *comitatu prædict.* refers to the county last named, *viz. Midd.* and then the trial in *Suffolk* is ill. Wherefore, &c.—And of that opinion was GAWDY upon the first motion.—But afterwards being moved again, because the county of *Middlesex* is not mentioned but in the recital, and not in the substance of the record; and the *assumpsit* is alledged to be made *apud Hepworth in comitatu prædict.* and *Suffolk* is put in the margent of the record, and there the action is brought; *Hepworth in comitatu prædict.* shall be intended to be referred to the county named in the margent of the record, and not to the county mentioned by way of recital, and so the trial may be intended there. Whereupon ALL THE COURT resolved, that it was well enough; and it was adjudged for the plaintiff.

If there be |
two coun-
ties in an in-
dictment, and
the offence be
charged so as to
leave the right
county uncer-
tain, it is bad.

BUT NOTE, in the same Term an exception was taken to the indictment of one *Grymes*, who was indicted of burglary *apud Hereford*, for that *Hereford* was in the margent of the indictment, and the indictment was, *quod Richardus Grymes de D. in comitatu Radnor. generosus, fecit burglariam apud S. in comitat. prædict.* And for this cause exception was taken, for that two counties were named, the one in the margent, the other in the indictment; so it is uncertain to which of them *comitatu prædict.* shall be referred; and if it should refer to the last mentioned, it is clearly ill: and for this cause divers indictments have been discharged.—And THE COURT held it to be an apparent and gross fault here.—*Quære*, Whether there be not a difference between these cases, because the county is mentioned in the body of the indictment?

CASE 51.

Noke against Awder.

Ante, Page 373, Case 21.

In an action of covenant by an assignee, the declaration need not shew the deed of assignment; provided the subject in dispute may be assigned without a deed; altho' the covenant on which the action is brought ought to be by deed.

IT was now moved again.—And ALL THE JUSTICES agreed, that the assignee shall have an action of covenant without shewing any deed of the assignment; for it is a covenant which runs with the estate; and the estate being passed without deed, the assignee shall have the benefit of the covenant also: and the executor of the *baron*, who is assignee in law, who comes in without deed, shall have the benefit of such a covenant, as appears 30. *Edw. 3. in Symkins Simonds' Case*. And POPHAM and FENNER held, that a feoffee shall vouch by a warranty made to his feoffor, without shewing any deed of assignment: for the deed of assignment is not requisite, nor is it to any purpose to

Ante, 373. Moor, 419. 5. Co. 18. 2. Mod. 116.

shew

shew it; for it appears by the books, that being shewn, it is not traversable by the vouchee. And as a warranty of covenant is not grantable, nor to be assigned over without the estate; so when the estate passeth, although it be by parole, the warranty and covenant ensue it; and the assignee of the estate shall have the benefit thereof.—COKE *Attorney General* (who was of counsel with the defendant) said, that the law was clear as you have taken it, yet the declaration is ill; for he declares, *quod cum Johannes King*, 10. *Eliz.* let that to the defendant for years, *virtute cujus* he was possessed, and granted it to *Abel* by indenture with the covenant, who in 15. *Eliz.* assigned it to the plaintiff: and further alledgeth, that long time before that the said *J. K.* had any thing, one *Robert King* was seised in fee, viz. 7. *Eliz.* and so seised, died seised in 15. *Eliz.* and it descended to *Thomas King*, who entered upon the plaintiff and ousted him: so he doth not shew that *John King* who made the lease had any thing; for *Robert King* was thereof then seised. And then when *John King* let to the defendant, and he granted his term by indenture, nothing passed but by estoppel; then the lessee by estoppel cannot assign any thing over, and then the plaintiff is not an assignee to maintain this action. But admitting that *J. K.* had at the time of the lease made by him, a lease for a greater number of years, and that *Robert King* had the freehold, and thereof died seised, and so all might be true which is pleaded; then the entry of *Thomas King* upon the defendant is not lawful. So *quâcunque viâ datâ*, this action cannot be maintained. And this point for the case of estoppel was adjudged in this court, in the case of *Armiger v. Purcas*, in a writ of error.

And all THE COURT held here, that it was clear upon the matter shewn, that the action lay not; for the plaintiff ought to have shewn an estate by descent in *J. King*, at the time of the lease and assignment made, or an estate whereby he might make a lease, and that this was afterwards determined; and so confesses and avoid the estate in the lessor, otherwise this action of covenant lieth not; and it never lies upon the assignment of an estate by estoppel. Wherefore they were of opinion to have then given judgment against the plaintiff; but afterward they would advise until the next Term.—NOTE. This was continued until *Trin.* 41. *Eliz.* and then being moved again, all THE JUSTICES resolved, that the assignee of a lease by estoppel, shall not take advantage of any covenant; but that it shall not be intended a lease by estoppel, but a lawful lease. But no sufficient title being shewn to avoid it, it is then as an entry by a stranger without title, which is not any breach. Wherefore it was adjudged for the defendant.

See 32. Hen. 8. c. 34.

Bateman against Allen.

Trinity Term, 36. Eliz. Roll 339.

EJECTIONE FIRMÆ of a lease of *William Hill* and *Ann* his wife, 14. *Martii*, 36. *Eliz.* for one-and-twenty years of land in *Uttaxton* in the county of *Stafford*. Upon not guilty pleaded, the jury found a special verdict, that *Henry Clark* was seised in fee, and by his will devised that land *prout in Newys et Scholastica's Case* (a). And further shews, that the testator had issue *Francis* and

(a) Plowd. 408.

F f 3

NOTE
against
AWDER.

1. Salk. 141.
Stra. 814.
Ld. Ray. 1536.
2. Com. Dig.
562.
Doug. 667.

The assignee of a lease which appears to be good only by estoppel, cannot maintain an action on the covenants.
Ante, 373.

Moor, 27. 419.
5. Co. 18. a.
Shower, 4.
3. Lev. 154.
1. Term Rep.
86.

CASE 522

A special verdict in which the jury have omitted to find a necessary fact, is bad.

Gilb. Eq. Rep.
255.
2. Ro. Abr. 693.
12. Mod. 623.

John

BATTMAN
against
ALLEN.

John his sons, and *Scholastica* and *Ann* one of the lessors; and that *Francis* and *John* died without issue male; that *Scholastica* took to husband *Newys*; which *Newys* and *Scholastica* levied a fine of that land; whereupon *William Hill* and *Ann* his wife, as in right of *Ann*, entered for the forfeiture upon *Rhodes* the conusee, and let it to the plaintiff, *prout* in the declaration; whereupon the defendant entered and ousted him. *Sed utrūm* the entry of the defendant upon the matter be lawful or not, they prayed the advice, &c. And if his entry were lawful, they found for the defendant; and if not, &c. So all the matter found in *Scholastica's Case* was now in question again.—But *WILLIAMS*, *serjeant*, moved, that forasmuch as in all the verdict it is not found that the defendant had the *primer possession*, nor that he entered in the right, or by the command of any who had title, but it is found that he entered upon the possession of the plaintiff without any title, his entry is not lawful, and the plaintiff had good cause of action against him: wherefore the plaintiff should recover.—And so held all THE COURT, that for this cause judgment ought to be given for the plaintiff, and they would not hear any argument of the matter in law. But if the conclusion of the verdict had been *si, &c.* Whether the entry of *Hill* and his wife were lawful or no? then the judgment should have been upon the matter in law: for then it should be intended that the defendant had title, if the lessor of the plaintiff had not title, and that the plaintiff had not cause of action; but now not.

But then it was moved, that the plaintiff notwithstanding should not have judgment; for he hath declared of a lease by *baron* and *feme*, and he doth not shew it to be by deed, and without a deed it cannot be said the lease of the *feme*. And in proof thereof, *vide Plowd.* 436. *Dyer*, 91. 15. *Edw.* 4. pl. 8.

A lease by husband and wife may be pleaded as the lease of both, during the coverture, without saying it was by deed.—*Yelv.* 1. 2. *Brown*, 248. *Cro. Jac.* 332. 617. *Co.* 2. 51. b. *Post.* 431. 656. 708. 3. *Bac. Ab.* 306. 3. *Co.* 16. 21. *Savil*, 111. *Dyer*, 91. b. *Plowd.* 403. *Co.* 2. 61. a. 1. *Burrow*, 78. *Dougl.* 329.

If a special verdict in ejectment find an entry on the plaintiff, without finding title or possession in the defendant, the plaintiff shall have judgment. 5. *Com. Dig.* 163. 171.

But all THE JUSTICES held it to be well enough; for it may be intended by deed, and yet no declaration thereupon. Also, although it be without deed, it is well enough, at leastwise during the life of the *baron*; and it is a lease from them both, during that time:

SECONDLY, It was moved, that it was found that *Hill* and his wife entered upon *Rhodes*, the conusee of the fine, and made the lease to the plaintiff, and it is not found that they expelled *Rhodes*; and then it rests upon the matter in law, Whether the plaintiff hath any lease? For if they entered, and their entry be not lawful, and they did not expel *Rhodes* (which is not averred), but *Rhodes* may be intended to continue in possession; then they gained no possession, and the lease to the plaintiff is void, and he hath not any cause of action; so it rests upon the matter in law to be decided.

But all THE JUSTICES held it to be good enough; for it shall not be intended that *Rhodes* was upon the land, but that they by their entry gained the possession; and although they be in as disseisors, their lease is good to the plaintiff, and the defendant without title is not to eject him. Wherefore, without any regard to the matter in law, the plaintiff had judgment to recover.

Woodliff against Drury.

TRESPASS. After verdict, COKE, *Attorney General*, moved in arrest of judgment. The case upon the pleading was, That one made a feoffment; and it was declared by the indenture, that it should be to the use of himself and *A.* his *feme* that should be, after their marriage, and of the heirs of their bodies; and he took *A.* to *feme*. Whether she should take by the limitation of this use? was the question.—And he moved that she should not: for presently by this feoffment, the fee is in the *baron* by the possession, executed to the use, which he had before the marriage; which cannot after the marriage be divided, and made an estate tail in him; for he had the fee in him until the marriage: for it might have been that the marriage had never taken effect, and that would have confounded the other use, and uses *in futuro* shall not rise upon such future acts; for then an use should rise out of an use. *Dyer*, 155.—But all THE JUSTICES held, that although he be seised in fee in the mean time, as in truth he is; yet by the marriage the new use shall arise and vest, if there be no act in the mean time to destroy that future use (as it was in *Chudley's Case*) (*a*), according to the limitation of the use. And judgment was given accordingly for the plaintiff.—*Vide statute 27. Hen. 8. c. 10. for transferring uses into possession.*

2. And. 198. Pollexfen, 78. 1. Co. 101. 2. 130. 2. 134. b. 138. Co. Lit. 187. b. 13. Co. 56. Lit. Rep. 290. 10. Mod. 423. Fearn, 199. 2. Bl. Com. 334.
(a) 1. Co. 120. Poph. 70. Jenk. 276. 1. And. 309.

Grills against Ridgeway.

Hilary Term, 37. Eliz. Roll 345.

DEBT upon an escape, supposing that the defendant, sheriff of *Devonshire*, suffered one *Chawner*, who was in execution, to escape in *London*, the 18. Decemb. 34. Eliz. 3. Co. fol. 52. The defendant pleads, that the said prisoner escaped the 16. December in *D.* in the county of *Devon*; and that he freshly pursued him; and by fresh suit took him again the 17. of December, and retained him in execution again; ABSQUE HOC that he is guilty *aliter vel alio modo*. And it was thereupon demurred; and argued for the plaintiff, that inasmuch as he was once escaped, and thereby cause of action to the plaintiff, no fresh suit may take away that action from him. But the prisoner being re-taken, shall not per-adventure take advantage of his own wrong to help himself, by *audita querela* thereupon; and in proof thereof, *vide* 13. Hen. 7. pl. 1. 14. Hen. 7. pl. 1. 5. Edw. 6. "Escape" Bro.—But all THE JUSTICES said, that as to that, an action of debt did not lie against the sheriff, where the sheriff used his endeavour, and took him again upon fresh suit, although that in the night or otherwise he might lose the sight of him. But if before he be re-taken the party brings his action of debt, then the re-taking of him afterwards shall not avoid the plaintiff's action, although the re-taking be upon fresh suit.—A second matter was moved, that the escape is supposed 18. December, 34. Eliz.; and he pleads that the prisoner escaped 16. December, and the re-taking was 17. December; so he answers not to the escape mentioned in the declaration: for the traverse *aliter vel alio modo* doth not answer to the time, but to the manner of any thing alledged; and for that *vide* 33. Hen. 6. pl. 28. 37. Hen. 6. pl. 27.—And of that opinion were all THE JUSTICES at this time, except PORHAM, that the plea was ill for that cause. *Sed ac curatur.*

CASE 53.

A use to the feoffor and his wife *that should be* in tail, is good, if the marriage takes place while the use exists; and whenever the contingency happens, the statute will immediately convey the use into possession. Ante, 46. Post, 827.

2. Roll. 791. Moor, 96. 634. 391. 1. And. 42. 316. 2. Leon. 14. 179. 223. Dyer, 374. pl. 42. 920. 3. Leon. 133. 4. Leon. 234. 12. Co. 48. 56.

CASE 54.

An action for an escape will not lie against the sheriff after he has re-taken the prisoner upon fresh suit; but if he saves the escape to have been on a different day than that alledged, it will be error. Ante, 44. 102. 318. 434.

3. Co. 52. 2. Salk. 628. 2. Will. 295. 2. Term Rep. 174.

Michaelmas Term,

37. and 38. Eliz. In the Common Pleas.

Sir Edmund Anderfon, *Knt. Chief Justice.*Sir Francis Beaumont, *Knt.*Thomas Walmsley, *Esq.* } *Justices.*Thomas Owen, *Esq.*Sir Edward Coke, *Knt. Attorney General.*Sir T. Fleming, *Knt. Solicitor General.*

CASE 1.

Boucher against Wiseman.

The office of
sheriff continues
until he has reg-
ular notice of
his discharge.

Dyer, 355. in
marg.

Moor, 186. 364.

ACTION upon the case against the defendant, late sheriff of *Essex*. Whereas the plaintiff had recovered against *Pyn-der* 100*l.* and had a *fiari facias*; that the defendant by virtue thereof levied 28*l.* and had not returned the writ, nor paid the money to the plaintiff. The defendant pleaded not guilty. And now upon evidence to the jury it was proved, that the writ was delivered to *Cowell*, the defendant's under-sheriff, 9. Nov. 34. *Eliz.* and the same day he made execution. And he proved, that the same day a writ of discharge was delivered him, dated 6. Nov. 35. *Eliz.*—But because he did not prove that he had notice of this writ of discharge before the execution served, THE COURT held clearly, that he was yet sheriff, and chargeable to the plaintiff's action.

In the appoint-
ment of under-
sheriff, an ex-
ception that he
shall not meddle
with writs above
such a value, is
repugnant and
void.

THE defendant also shewed the indenture whereby he made *Cowell* his under-sheriff; wherein was an exception, that he should not meddle with the execution of any writ above 40*l.*; so as to that he was not his under-sheriff, but he did it *de son tort demesne*, and the defendant is not chargeable therewith.—But all THE COURT held it to be a void exception: for when he made him his under-sheriff, therein was included that he should execute all writs; and therefore the exception is repugnant and void.

Ante, 12. 294.

2. Brownl. 281. Hob. 13. 12 Mod. 463. See 12. G. 2. c. 13. f. 4.

A *fiari facias*
binds the goods
of the defendant
from the date of
it, and over-
reaches a *boni*
fide sale on that
day.

THIRDLY, It was alledged, that this was not a due execution; for *Pyn-der* had made a deed of his goods before, &c. and shewed the deed dated the same day of the writ of execution.—ET PER TOTAM CURIAM, although the gift were *bona fide*, yet execution might be taken of those goods. For by the suing forth the execution, all the defendant's goods are liable; so as no gift of the said goods, the day of the date of the writ or afterwards, can stop the execution (a). Wherefore they resolved the jury accordingly, without inquiring of the fraud; and they found for the plaintiff. Vide 4. Hen. 6. pl. 7. 17. Aff. pl. 2. 5. Eliz. Dyer, 219.

Co. 8. 171. 2.

Ant. 174. 181.

2. Strange, 751.

1. Bl. Rep. 67.

Ld. Ray. 244. 766. 349.

(a) See 29. Car. 2. c. 3. 5. Mod. 377. Salk. 320. Skin. 257. 2. Mod. 310. 2. Vent. 219. Bunb. 281. Andr. 308. Ante, 174. 181.

CASE 2.

The Dean and Chapter of Hereford against the Bishop of Hereford and Ballard.

A grant by a
dean and chap-
ter of the next
avoidance will

QUARE IMPEDIT. The case was, That the dean and chap-ter of *Hereford* granted the next avoidance of a church to

not bind their successors. Ante, 407. 10. Co. 60. Cro. Car. 259. 5. Co. 15. 2. 1. And. 244.

1. Mod. 204. 2. Mod. 56. 3. Bac. Abr. 353. 391.

Ballard

Ballard. Whether that were a good grant to bind the successor by the 13. *Eliz.* c. 20. ? was the question.—WALMSLEY and OWEN held, that it was not; for although it is not a thing whereof any profit can be made, nor any rent reserved, yet it is an hereditament, whereof the statute intends that no grant shall be made; and so it hath been adjudged in the case of the bishop of *Litchfield*.—But ANDERSON *è contra*. For the statute doth not intend to restrain them but for such things which are for profit, and by reason whereof prejudice might accrue to the successor, which cannot be in this case. Wherefore, &c.—BEAUMOND was absent. *Et adjournatur*.

The DEAN
and CHAPTER
of Hereford
against
The BISHOP
of Hereford
and BALLARD.

Goodday *against* Michell.

CASE 3.

TRESPASS, *quare clausum fregit*, and two gates and three perches *sepium fregit*. The defendant justifies, for that the said close was within the parish of *Rudham*, and that all the parishioners there from time whereof, &c. had used to go over the said close upon their perambulation in *Rogation-week*; *et quia* the plaintiff *obstruxit duas januas et tres particatas sepium in viâ prædictâ*, the defendant, being one of the parishioners, *januas et tres particatas illas sepium fregit, &c.* And it was thereupon demurred.—And after argument by the *Serjeants*, THE COURT resolved for the plaintiff.—ANDERSON. It is not to be doubted, but that parishioners may well justify the going over any man's land in their perambulation, according to their usage, and to abate all nuisances in their way; as *F. N. B.* 185. *B. and the Book of Entries*, 158. But whether the justification here, be good or not? was the question. And he held it to be ill, for parishioners cannot prescribe, neither in matter of easement nor interest, nor otherwise; but in matter of easement, as a way to the church, or common fountain, or otherwise, they ought to alledge custom or usage within the parish, as 7. *Edw.* 4. *pl.* 26. & 15. *Edw.* 4. *pl.* 29. are.

Parishioners
cannot alledge
a right by pre-
scription to
abate nuisances,
and obstructions
to their peram-
bulation in Ro-
gation-Week.
Ante, 180.
Post, 362.
S. C. Owen, 71.
1. *Saund.* 117.
1. *Lev.* 176.
Co. Ent. 650.
1. *Bro. Ent.* 379.
Foxall's Case,
ante, 180.

Secondly, The plaintiff declares of the breaking of two gates, *et tres particat' sepium*. The defendant makes title to a way; and because the plaintiff made *duas januas et tres particat' sepium* (and doth not say *prædictas*), the defendant *januas et sepes illas fregit*; so he justifies the breaking of the gates and hedges in his bar mentioned; but he answers not to them, whereof the plaintiff declares.—And thereto agreed all THE JUSTICES, that this fault in the bar was incurable. For WALMSLEY said, that he thereby doth not answer to that wherewith the plaintiff chargeth him. For it may be, that the plaintiff had erected four *januas et sex particatas sepium*; and the defendant hath broken all of them; whereof for two gates and three perches of the hedge he might justify for the cause alledged; and for the other two gates and three perches, &c. cast down, he brought the action. So the defendant answers not to them, whereof the plaintiff complains; and he cannot refer it to those mentioned in the declaration, but to the *januas et sepes* mentioned in the bar.

The plea must
precisely answer
the allegations
in the declara-
tion.
Co. Lit. 303.
6. *Mod.* 33.
1. *Salk.* 324.
2. *Salk.* 682.

The bar is also ill for another cause, for that it is *et quia* the plaintiff *obstruxit januas, &c.* whereas he ought to have averred, precisely *quod obstruxit*; for otherwise no issue can be taken.—Wherefore it was adjudged for the plaintiff.

Pleading by a
"quia" ad-
judged bad.
1. *Saund.* 117.
Dyer, 257.

Fitch

CASE 4.

Fitch against Hockley.

When a copyholder surrenders to the use of his will, the estate remains in the copyholder and if he afterwards surrenders it to *al.* without making a will, the second surrender is good; but if he does not make a will, *quævis* if the surrenderer shall take, or it shall descend to his heir?

Ante, 148.

4. Co. 23. a.

Co. Jac. 376.

1. Leon. 102.

4. Bac. Abr.

299.

Gibb. Ten. 217.

Gibb. Uses, 36.

2. Will. 16.

Dougl. 716.

1. T. Rep. 609.

Ante, 361.

Ante, 148. 407.

Co. Lit. 112. a.

Post. 378.

Co. 4. 23.

(a) N. B. Copyholds will not pass by will without a surrender. 2. Bro. C. C. 64. but if surrendered, they will pass by a will not duly attested to pass lands. 2. Brown. Ch. Caf. 58.

TRESPASS. Upon demurrer upon evidence the case was, A copyholder in fee surrendered to the use of himself for life, remainder to *J.* his son for life, remainder to the use of his last will; and the admittance was *secundum formam sursum redditionis prædictæ*. *J.* dies; the father afterwards surrenders it to the use of the defendant in fee, and dies without making any will. Whether this be a good surrender? was the question between the heir of the copyholder and the defendant.

HARRIS moved, That it was void to vest the fee in the defendant; for when the father surrendered to the use of himself for life, and after to the use of *J.* his son for life, and after to the use of his last will, the fee of the copyhold was in the lord; so as the father had but an authority to dispose it by his will, and not otherwise. And then when he makes not any will to dispose thereof, the law shall transfer it to the heir, and the surrender in the interim to the defendant is void.

WALMSLEY, *Justice*. The surrender to the defendant is good; for a copyholder may surrender parcel of his estate, and in such manner as pleaseth himself; and he who comes in by such a surrender, is in by the copyholder, and not by the lord. And when a copyholder surrenders to the use of one for life, or in tail, the residue shall be said to be in himself, and he shall be said to be the donor. But here he hath expressed an use to himself for life, remainder to *J.* his son for his life, and after to the use of his will; the which is as strong as if it had been to himself. And although he might have disposed it by his will, if he had not made that second surrender (a), yet by that surrender it passed to the defendant.

ANDERSON, *Chief Justice*, accord. And it is a feoffment at this day to the use of his will; for it is to the use of himself, because he might dispose of it by his act in his life-time; so he might here. *Set adjournatur*.

CASE 5.

Jeremy against Goochman.

A consideration alleged in the preter tense held bad.

Post. 741. 835.

1. Roll. Ab. 11.

Dyer, 272.

Moor, 220. 643.

3. Lev. 366.

Strange, 953.

ASSUMPSIT. And declares, That in consideration *quod deliberasset et dedisset* to the defendant twenty sheep, he assumed to pay unto him five pounds at the time of his marriage; and alleged in *facto*, that he was married, &c. The issue was *non assumpsit*, and found for the plaintiff; and now moved in arrest of judgment, because it is for a consideration past; for it is in the preter tense *deliberasset*, and therefore no cause of action.—And of that opinion was THE WHOLE COURT; wherefore judgment was stayed.

CASE 6.

Bright against Forth.

If a recovery be suffered of a manor which extends to a vill where there are d. mshes, copyholds for life, and services; a grant of such copyhe'd made at a court held in that vill is void, although the lands in the vill were excepted in the recovery. Ante, 38. 103. 2. Com. Dig. 532. 2. Term Rep. 415.

REPLEVIN. The defendant made conusance as bailiff to Margaret Countess of Derby for damage feasant. Upon demurrer the case was, That HENRY Earl of Derby was seised of the manor of Curry-Revel (which extended into Curry-Revel and Bradway and into other villages; and in Bradway were divers

copy-

copy.

copyholders for life), and suffered a recovery of the manor, excepting the land in *Bradway*; and afterwards that part which extended into *Bradway*, was conveyed to the Countess of *Derby*; and afterwards the Earl and Countess of *Derby* kept a court at *Bradway*, and the steward granted that copyhold, being a copyhold for life, to the plaintiff: and, Whether this were a good grant by copy, or not? was the question.

GLANVILLE. The grant is void, because a manor cannot be severed. And although there be demesnes, copyholds, and services in *Bradway*, yet that cannot make it to be a manor; and then the grant of the copyhold is void, especially being a copyhold for life: for there, when the estates of the tenants for life are determined, they cannot be granted again when the manor is dismembered: but of copyholds of inheritance, it may peradventure be otherwise; for it remains a manor, and a court shall be kept as to them. And this diversity was agreed in *Sir Christopher Hatton the Lord Chancellor's Case*. And so was the *Case of Meredith* for a copyhold in *Stokingham*, where there were copyholds of inheritance. And this very case was here, 29. *Eliz.* where a feme was endowed of divers copyholds for life, so as they became severed from the manor; and the granted copyholds: and adjudged void.

WILLIAMS *à contra*. For being averred, that there are demesne, copyholds, and services in *Bradway*, it shall remain a manor at least-wise to grant those copyholds. *Vide* 26. *Hen.* 8. *pl.* 4. 33. *Hen.* 8. *Br.* 1. *Hen.* 5. *pl.* 11.

And afterwards being moved, ALL THE JUSTICES resolved, that the grant was void, in regard there was not any such manor of *Bradway* before, nor now. And **ANDERSON** said, If this severance had been of copyholds of inheritance, that the copyholders and their heirs should have had it; but it can never be surrendered, for surrenders are by custom, and therefore they ought to be in the court of the manor; and a surrender to the lord himself in his house, or out of court, is not good: *quod* **BEAUMOND** concessit (a): wherefore it was adjudged accordingly for the avowant.—And here a case was remembered, which was adjudged in the queen's bench, in this very point, that this was a good copy, 4. *Co.* 26. a. But it was thereto answered, that it was a strange judgment, and never was entered by the direction of the Court; and a writ of error was brought thereupon in the exchequer-chamber; and the opinion of THE JUSTICES there was, that it was erroneous. And thereupon the copyholder compounded, and took only his corn, and relinquished the title (b).

(a) Ante, 103.
Co. Lit. 59.
9. Co. 75.
1. Ro. Ab. 500.
2. Vezey, 302.
Ld. Ray. 76.
636.
Gilb. Ten. 251.
257.
(b) Melwich v.
Luther, ante,
p. 103. Case 10.

Lewen against Dodd.

CASE 7.

DEBT. The case was, That one seised of a house in *London*, let it for years rendering rent, and afterwards devised it to his "two sons equally, and to their heirs." The one dies: Whether it shall survive to the other and his heirs? was the question.—**DREW** argued, that it should not; for they are by those words tenants in common, and not jointenants; for to that intent the deviser put in that word "equally;" and 30. *Hen.* 8. "Devise," 29. shall go to his heir. *Vide* post. 675. Co. Lit. 190. b. *in ante*. 2. Sid. 53. 3. Com. Dig. 34. 3. Levinz, 373. 1. Salk. 229. 3. Atkyns, 731. 2. Vez. 152. 1. Willf. 341. 165. Say. 67. 1. Peer. Will. 19. 2. Peer. Will. 285. 3. Brown P. C. 297. 4. Brown. P. C. 224. 12. Mod. 296. Ld. Ray. 622. Cowp. 257. 334. 357.

A devise to
"his two sons
equally, and
to their heirs,"
This creates a
tenancy in com-
mon; and if one
of the devisees
die, his portion

LEWIS
against
DODD.

devise to two *et heredibus eorum*, the one dies, his part shall not survive, but his heir shall have it; for so was the intent of the devisor: *a multo fortiori* in this case, where it is limited to them *equally* betwixt them, and their heirs after them. And in *Pasch. 18. Eliz.* is a precedent in the court of wards, in one *Shepherd's Case*, where he made a devise in this manner: "ITEM, I will that my lands called *Earth-pits* shall *equally* remain to *Joan and Mary* my two daughters, and the heirs of their two *bodies*." And by the opinion of MANWOOD and DYER, it was resolved, that they were tenants in common, and that the surviving daughter should not have her sister's part for her life.

ANDERSON. There is an equality in estate, in condition, in taking of the profits; and all this is here. And if it had been *equis-portionibus*, I should doubt, whether they would be tenants in common; but as it is, they are jointenants. But if the words had been to them *equally*, and to their heirs *equally*, that would make a tenancy in common; but here *equally* is annexed to the estate, and they being jointenants, have one equal estate; and the book vouched in 30. *Hen. 8.* hath been oftentimes over-ruled to be no law.—OWEN. A devise ought to be taken according to the intent of the devisor; and the intent here was, not to give all to the one by the survivorship, but an equal advancement, and that their heirs should have an equal advantage. If we should construe it, that they should be jointenants, they would not have it so; and the word "*equally*" is vain and idle; and a devise to them "*equally*," and to be "*equally* divided between them," is all one.—WALMSLEY. The intent in the devise shall be collected upon the words: and when the intent is ambiguous upon them, it is a sure way to follow the course of the common law. And it may be he put this word "*equally*" in his will, to shew his intent, that the one son should have it as well as the other: and that may be satisfied, if they take as jointenants, for they shall have equal portions and equal possibilities of survivorship; and the case of 30. *Hen. 8.* before vouched was never taken for law. And I have demanded the opinion of divers other Justices of our house; and they held, that they were jointenants; and the word "*equally*" is not of any effect, but to shew his intent, that they should have an equality in their estates, and in the perception of the profits; which intent is satisfied, if they be jointenants. And in 17. *Eliz.* was a case in this court, where a devise was to two, part and part like; and the Court was divided in opinion, whether they were jointenants or tenants in common. But LORD DYER held them to be jointenants. And it is not a safe course to search the intent, unless we be certain of the intent. And as to the case vouched in the court of wards, it may be that they were tenants in common of the freehold there, because the inheritance is several.—BEAUMOND. If the devise had been "*to them, and their heirs equally*," it is clear, that they should be tenants in common: so he conceived it to be all one here, otherwise the word "*equally*" should be void. For the construction that "*equally*" shall refer to the estate and perception of the profits, would have been good without this word "*equally*." And the words being "*equally* to them, *and* to their heirs," this copulative conjoins "*equally*" to the heirs, as well as to them; and they be of such sense as a devise "*to them equally*, and to their heirs

Br. Dev. 29.

Ante, 330.

"equally" in which case they cannot be jointenants. And in the queen's bench it hath been agreed, where the words were "equally to be divided," that they should be tenants in common. And I have spoken with the Justices of our house, and they incline to this opinion. Whereupon it was adjourned (a).

(a) Adjudged to be but a tenancy in common; and the judgment affirmed on a writ of error by four Judges against three, post. 696.

LYWEN
against
DODD.

Upon against Basset.

CASE 2.

TRESPASS. Upon demurrer the case was, That the plaintiff and defendant claimed by several leases from one and the same person. The plaintiff in his replication avers, that the defendant's lease was made upon fraud; but shews not any fine by himself paid for his lease, nor any rent reserved thereupon, nor any other valuable consideration wherefore it was made. Whereupon the defendant demurred thereto.—**YELVERTON.** At the common law, there was not any fraud remedied, which should defeat an after purchase, but that only which was committed to defraud a former interest: *quod fuit concessum per CURIAM.* And the statute of 27. Eliz. c. 4. did not remedy it; for there is not any money or consideration paid for this second lease, no more than for the first; and therefore not aided by that statute.—**LEWKNOR** *et contra.* For every one who obtains any thing or estate by his own act, is a purchaser, and so within the words of the statute. The plaintiff hath also averred, that it was made by fraud to deceive him, which is confessed by the demurrer. Wherefore, &c.—**ANDERSON.** The confessing the fraud is not material, forasmuch as the plaintiff is not such a person as ought to have benefit thereof, and within the remedy and provision of the statute. It is clear, a fraudulent conveyance is not made void against all, by that statute, but only against those who afterwards come to the land upon good consideration; for so are the words, and so was the intent of the statute: and therefore if a man who hath not good government of himself, makes a conveyance by advice of his friends of his lands upon trust, and without any consideration, and afterwards one procures him, for five hundred pounds, or other petty consideration, to sell unto him land worth five hundred pounds *per annum*; although this last purchaser pays money, yet he shall not avoid the first conveyance; for the statute was made to help those who came to land upon good consideration lawfully, and not without consideration, or by any indirect means: and this case hath been resolved.—**WALMSLEY** *accord.* For it is not void against all; no more than if a fraudulent gift be of goods, it is not fraud by the 13. Eliz. c. 5. against all, but only against his creditor, but remains good against the donor himself (a).—**BEAUMOND.** This is not void against all, as a feoffment upon maintenance or champerty is not void against the feoffor, but against him who hath right. And I was privy to a case which was resolved by the two Chief Justices and three other Justices, viz. One made a lease for eighty years without consideration, and afterwards conveyed the land to his wife for a jointure after marriage. And they resolved, because this last conveyance was voluntary without valuable consideration, that the wife could not avoid the former lease, by averring that it was fraudulent.—**OWEN** accorded with

If a man makes a lease by fraud, and afterwards makes another lease bona fide, the second lessee shall not avoid the first lease. Cro. Jac. 180. 454. 3. Co. 83. Moor, 615. 618. 3. Keb. 526. 751. W. Jones, 411. T. Jones, 94. 1. Vent. 257. 6. Co. 72. Bridg. 23. Lane, 22. S. C. 45. 2. Lev. 147. 1. Vern. 285. 85. 1. Lev. 150. Hard. 395. 2. Roll. Rep. 305. 2. Vez. 645. Bul. N. P. 108. 3. Will. 356. 1. Burr. 396. 2. Com. Dig. 579. Powell on Powers, 336. Cowp. 280. 705. 2. Bl. Com. 296.

(a) Dyer, 295. 6. Co. 72. 3. Co. 80. Yelv. 196. Cro. Jac. 271.

UPTON
against
BASSET.

with them in *omnibus*; and said, that he was at the making of this statute, wherein special care was taken, that there should not be any words which should extend to purchasers, but such as paid money, or other good consideration for their purchase. Wherefore it was adjudged for the defendant. *V. 3. c. 83.*

CASE 9.

Austye against Fawkener.

If issue be taken upon a had prescription, it is aided, after verdict, by the statutes of *jeofails*.
Ante, 227. 259.
Post. 778.
(58.)

Yelv. 74.
Cro. Jac. 312.
5. Co. 43. a.
Hob. 113.
1. Com. Dig. 331.
2. Will. 260.
1. Salk. 336.
Ante, 180.
Post. 455.

REPLEVIN. The defendant avows for *damage feasant*. The plaintiff justifies, for that he had a close adjoining to the defendant's close; and that the defendant and all the occupiers of the said close from time whereof, &c. had used to repair the fences between the closes; and for not sufficient inclosing, his beasts entered, &c. Issue was taken upon the prescription, and found for the avowant; and now moved in arrest of judgment, that the prescription, "that every occupier," &c. is too general; for tenant at will, or at sufferance, or a disseisor, are occupiers.—**WALMSLEY.** True it is, the prescription is not good: for this inclosure is a charge upon the land; and they who are only occupiers, as a disseisor, tenant at will, or sufferance, cannot charge the land therewith: but it ought to have been, that he and all they whose estate, &c. But such a prescription to pay so much in discharge of tithes by the occupiers of lands, hath been allowed to be good; for that goes in discharge, and for the benefit of the land, and tithes arise upon the occupying the land. But yet in regard that issue is taken upon this prescription, and a verdict hath found it, this is not any cause for staying judgment, but it is aided by the statute of *jeofails* (a).—And thereto THE OTHER JUSTICES agreed, viz. that the prescription was not good, and that it was helped by the said statute. Wherefore, &c.

(a) See 32. Hen. 8. c. 30. and 4. & 5. Ann. c. 16.

CASE 10.

Gryfinan against Lewes, Parson of Kingsland.

Payment of one species of tithe is not discharged by paying a modus for another.

Ante, 363.
Post. 475. 786.

Moor, 446. 511.
2. Let. 1052.
2. Inst. 652.
1. Mod. 229.
Carth. 461.
Salk. 657.
2. Bl. Com. 30.
Ld. Ray. 130.
242. 252.
1. Ld. Ray. 1162.
5. Bac. Abr. 83.
2. Peer. Will. 572.
Wood, Inst. 172.
2. Salk. 657.

PROHIBITION. For suing for tithes of cows, steers, oxen, horses, &c. Wherein he surmised a custom, that every parishioner should pay for every milch cow one penny by the year, and for every other cow an half-penny *per annum*, in recompence and discharge of all tithes of cows, oxen, steers, and calves; and also a penny for every mare, in discharge of all tithes of all horses, mares, and colts there. And it was thereupon demurred, and consultation prayed. For tithes paid for one thing, cannot be intended a recompence for tithes of another thing, where tithes are responsible for both in kind: and therefore it was adjudged in *Sir Charles Morrison's Case*, where one prescribed to pay the tenth part of corn in the sheaf, for the tithes of all which is in the sheaf, and of all which is raked; and adjudged to be a void prescription, because he is to pay tithes of both of them. It is also unreasonable; for then he may put the lesser part in sheafs, and leave the greater part to be raked. And the opinion of *Fitz. N. B. 53. G.* that tithes shall not be paid for the agistment of cattle, is no law.—And of that opinion was THE WHOLE COURT, that this prescription is not good to be discharged of one tithe by the payment of another: for he ought to pay somewhat for

for the tithe of every thing which is due. And if tithes should not be paid for the agistment of cattle, he might employ all his land in feeding of barren cattle, and so defraud the parson of his tithes. And a special consultation was afterwards awarded *dummodo non agatur de decimis*, for milch-kine, draught oxen, or beasts agisted for provision for his house. *Godolphin's Rep.* 384.

GRYMAN
against
LEWEL.

Jennings *against* Bragg.

CASE II.

EJECTIONE FIRMÆ. Upon a special verdict the case was, That a disseisee made a lease for years, and delivered it as an escrow to a stranger, commanding him to enter into the land, and then to deliver it as his deed, who did it accordingly: and, Whether this was a good lease or not? was the question. And it was moved, that it was not; for when it is delivered as an escrow, and afterwards is delivered upon the land as the deed of the disseisee, that hath relation to the time of the delivering it as an escrow to be his deed; at which time he had but a right to the land, and his lease was not good. As if an infant or *feme covert* should deliver a deed as an escrow, and it is delivered after full age, or when she is sole, yet it is void; for it hath relation to the first delivery; so *è converso*, where a *feme sole* delivers a deed as an escrow, &c.—And this case was agreed by THE COURT, because it was delivered by authority before, when she was *sole* so it is of a deed of feoffment, and letter of attorney, therein to make livery by a man of *sane memory*, which is delivered by the attorney, when he is *non compos mentis*; yet it is good, because it hath relation to the authority before.—But ANDERSON said, it was a good lease in this case; for it was not his deed until the second delivery, at which time he had good right and power to let it. Wherefore, &c.—*Sed adjournatur.* 3. Co. 35.

A disseisee out of possession makes a lease for years, and delivers it as an escrow to a stranger, who delivers it upon the land as the deed of the lessor. *Q. If this is a good lease?*
Post. 483.
Co. Lit. 48.
3. Co. 35. 55.
2. Bendl. 81.
2. Ro. Abr. 25.
3. Com. Dig. 328.
3. Bac. Ab. 400.
1. Wood's Com. 14. 651. 715.
725.
Shep. Touch. 70.

Belford *against* Foord.

CASE II.

TRESPASS. The case was, A prebend of *Sarum* made a lease for seventy years, and the dean and chapter confirm *concessionem prædictam* for fifty-one years, *et non ultra*; the fifty-one years are now expired: and, Whether this were now a good lease against the successor? was the question.—GLANVILLE moved, that it was good; for the term is a thing entire, and therefore cannot be apportioned by their confirmation. And here they confirm *dimissionem prædictam*, which is the whole term, which shall not be controlled by the subsequent words. This confirmation also is but a consent, and therefore cannot be given conditionally, or in any other manner than the thing itself whereto it is annexed, is given. And the difference is betwixt a consent and an interest; for he that hath an interest, may thereto annex a condition or limitation. And if the prebend's successor be to bring his action of waste, he ought to count upon a lease for seventy years, and that they had assented thereto; and 7. Hen. 4. is, that assent before the grant is sufficient.—ANDERSON. If the lessor is to bring waste, he shall count of a lease for seventy years. But after his death, if the successor brings waste, he shall shew the confirmation and especial matter.—WALMSLEY. The lease is made good for all the years; for all the right and interest remained in the prebend, and the dean and chapter have only a consent, which cannot

A prebend makes a lease for 70 years. The dean and chapter confirm the said demise for 51 years and no more. This is a confirmation of the whole term of seventy years.
Post. 472.
5. Co. 81. a.
Dyer, 52. 338.
Moor, 471. 487.
Co. Lit. 300.
Bendl. 238.
1. And. 47.
Heil. 75.
3. Bac. Ab. 384.

BUTFORD
against
FOORD.

(a) It was argued again, and adjudged that the confirmation went to all, post. 472*.

not be apportioned; but they ought to assent to all, or to no part; for their consent goes only to the action, which is to the making of the lease; and not to the thing acted, which is the interest of the lease: then when they consented to the making of the lease, they had done all which they could do, and had nothing to do with the lease itself. But ANDERSON and THE OTHER JUSTICES held strongly, that the lease was not good but for fifty-one years only; for they at their election might confirm for all or for part, and the confirmation shall not be taken larger than they have made it: but if they confirmed the demise, and not shewn for what time, it should be the entire term. But when they say for fifty-one years, *et non ultra*, that very well qualifies what is precedent, and it shall not be construed larger, &c. Wherefore, &c.—*Et adjournatur* (a).

CASE 13.

How an award is to be delivered.

Parker against Parker.

(a) Postea, 797.
It must be delivered to each,
L. C. B. PARKER'S MSS.

DEBT upon an obligation, conditioned to stand to the arbitration of J. S. so as it be delivered to either of the parties before Michaelmas. The defendant pleads, that no part of the arbitrament was delivered unto him before Michaelmas. And it was thereupon demurred; because if it were delivered to any of them, it sufficed.—But ALL THE JUSTICES (ANDERSON *absente*) held, that one part of the arbitrament ought to be delivered to each party, so as he might take notice thereof; and this word *either* shall be expounded as *every*.—But when ANDERSON came in court, being moved unto him, he doubted thereof: and the matter was referred again to arbitration (a).

CASE 14.

Jurisdiction of the court leet.
2. Hawk. P. C. 313, 314.

Wormleighton against Burton.

Trinity Term, 37. Eliz. Roll 2838.

REPLEVIN. The defendant made confuance as bailiff to Sir Fulk Greville, for that he had a leet within his manor of D. and that at such a court the plaintiff was amerced for putting his geese upon the common there; and for that amercement distrained.—And because it was not shewn that the common was within the leet; as also, because THE COURT held, that it was not any article inquirable in a leet, nor punishable there; it was adjudged without argument for the plaintiff.

CASE 15.

To an *audita querela* by two; if outlawry of one be pleaded, the other shall have summons and severance.
Post. 472. 549. 635. 892.

6. Co. 25. b.
30. Co. 135. a.
Cro. Jac. 425.

Worsley and his Son against Charnock.

AUDITA QUERELA, to avoid an execution upon a statute, where outlawry in one of the plaintiffs was pleaded. And thereupon a demurrer in law, whether it might be pleaded in that suit, which is only to be discharged, and not to recover any matter. But it was ruled to be a good plea; whereupon the other plaintiff prayed *summons and severance*, so that he only might sue.—And ALL THE JUSTICES, except WALMSLEY, held, that he might well have it, for that in this case they only sue to be discharged: wherefore the nonsuit of the one shall not prejudice the other. It is also to discharge their land; in which case it is not reasonable that an act of the one should make the other man's land to be charged.—But WALMSLEY doubted thereof; and therefore it was adjourned. *Vide* 34. Hen. 6. 31.

Hart

DEBT
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Poph. 109.
CRO.

Hart against Brewer and Harison.

CASE 16.

Trinity Term, 36. or 37. Eliz. Roll 2042.

EJECTIONE FIRMÆ. It was found by a special verdict, That one *Herst*, 26. Hen. 6. devised two houses in *Walbrook* in *London* (being the houses now in question) to the churchwardens of *St. Stephen's* to these uses. First, To find an *obit*, and to bestow three shillings and four pence annually upon an *obit* in the church of *St. Stephen's*. Secondly, To repair the same houses. Thirdly, To bestow the residue of the profits about reparations of the same church of *St. Stephen's*, and to provide ornaments in the same church. But the devise was conditional, that if they failed in finding the *obit*, that then the estate should cease, and the land should be to the mayor and commonalty of *London*; and that they should find that *obit*, and repair the tenements, and bestow the residue of the profits upon *London-bridge*. And they found the statute of 1. *Edw.* 6. c. 14.; and that the *obit* was well maintained within five years before the statute, and derived title to the defendant under the queen; and the successors of the churchwardens made a lease to the plaintiff: and, Whether these houses were given to the queen? was the question.—**DANIEL** moved, that they were; for the *obit* is the principal thing why the houses were devised: and the reparation of the houses and church are but accessories, without which the *obit* could not be maintained; but if it had been to make the reparation, or for the ornaments of another church, it had been otherwise. Wherefore, &c.—But **ALL THE JUSTICES** held *à contra*, and for the plaintiff, that the queen should have no more but that which was appointed for the maintenance of the *obit*; and that she should not have that which was given for the other use of reparation and finding ornaments; for although the *obit* is appointed to be in the church, yet the church is for divers other good purposes; and for those good uses the church ought to be repaired, and to have ornaments. And the letter of the statute is plain, that the king shall have that only which is given to superstitious uses. And **WALMSLEY** said, that the case of the town of *Wakefield*, where house and lands were given to give part of the profits to a priest to say mass, and other part of the profits for the reparation of the said house, and other part of the profits to repair certain bridges, it was adjudged that the queen should have all but what was given for the reparation of the bridges. And **BEAUMOND** said, that he was of counsel in a case in the queen's bench, where land was given to find a priest to say mass, and also to give part to the poor; and because the part to be given to the poor was uncertain, the queen had all: but there is an express difference by the letter of the statute between land given for the maintenance of an *obit*, and land given for the maintenance of a priest. Wherefore it was adjudged for the plaintiff.

Scot against Sir Anth. Mayn.

CASE 17.

DEBT upon an obligation, conditioned for the performance of a covenant in an indenture, wherein *Mayn* the defendant had let to the plaintiff certain land for twenty-one years, and covenanted to render of the old one, and disables himself by levying a fine, the condition is broken, though the lessee does not offer to surrender. *Post.* 479.—2. *And.* 18. S. C. 5. Co. 20. b. *Jones*, 374. *Moor*, 452. *Poph.* 109. *Bull.* 32. 1. *Bac. Abr.* 418. 3. *Eac. Abr.* 715. 2. *Bl. Rep.* 1190. *Dougl.* 50.

CRO. ELIZ. PART I.

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nanted

Scot
against
SIR ANTH.
MAYN.

nanted with him, that upon the surrender of that lease at any time during his lease, he would make him a new lease for so many years, &c. The defendant pleaded, that the plaintiff had not surrendered unto him, &c. The plaintiff shews, that the defendant had levied a fine of those lands *sur consance de droit come ceo, &c.* to Sir John Savage. And it was thereupon demurred; because he doth not aver, that he offered to make him a surrender, although he were not able to accept thereof, nor to make a new lease.—But ALL THE COURT held, that there needed not any tender to be made of the surrender, when he hath disabled himself to accept thereof by his own act, or to make a new lease. Wherefore it was adjudged for the plaintiff. And error was afterwards brought thereupon, and the judgment affirmed.

See 8. & 9. Will. 3. c. 11 s. 8.

CASE 18.

Buckler against Harvy.

A. being tenant for life, makes a lease for years to B. and then grants the reversion for his own life to C. *habendum* from Midsummer next ensuing. The grant is void, though the lessee attorns after its commencement; and if C. after the expiration of the term, enters under this grant, and A. levies a fine to him, it is a forfeiture of the estate for life, for which the remainderman may enter. Post. 535.

S. C. 2. Co. 55.
Moor, 423.
2. And, 29.
Co. Lit. 252.
217.
10. Vin. 378.
Hob. 170. 175.
5. Co. 94.
Roll. Rep. 261.
Dyer, 214.
2. Vent. 204.
3. Co. 21. a.
Cro. Jac. 660.
1. Salk. 246.
3. Com. Dig.
229. 259.
2. Bac. Abr.
487. 496.

EJECTIONE FIRMÆ. Upon a special verdict the case was, Tenant for life, remainder to A. Buckler in tail. Tenant for life, 4th March, 20. Eliz. makes a lease for four years; and afterwards 11th April, 20. Eliz. grants the reversion *habendum tenementa prædicta*, from Midsummer next ensuing, for the life of the grantor: after Midsummer the lessee for years attorns; the term afterwards expires; the grantee enters; the grantor levies a fine unto him *sur consance de droit come ceo, &c.*; the tenant in tail in remainder enters for the forfeiture, and lets it to the plaintiff, upon whom the defendant, being the grantee in reversion, re-enters, the first tenant for life being yet alive. *Et si, &c.*

The first question was, Whether by this grant of the reversion *habendum* after Midsummer, and the attornment made after Midsummer, the grant be good or void?

Secondly, Admitting it to be void, If when the grantee enters, and he being in by disseisin, the tenant for life levies a fine to him *sur consance de droit come ceo, &c.* whether this be a forfeiture of his estate or not?

It was argued by HEALE, for the plaintiff, and by HARRIS, for the defendant.

WALMSLEY, Justice. A grant of a reversion, *habendum* after the death of the tenant for life, is good; for so is the course in fines; for this limitation is as to the having the possession, and not as to the having the reversion, for that is in the grantee presently; but when a reversion is granted *habendum* after a day future, he is thereby excluded to have the reversion until that time, and therefore it is utterly void; and the *habendum* shall not be void, but where it is not requisite, as in release of a right, or grant of a term; but here the *habendum* is necessary to shew the estate: but as to the forfeiture I make some doubt; for I know not how there can be a forfeiture to him who hath not any reversion; for by the entry of the grantee, it is disseisin; and all remainders and reversions are taken from the parties in whom they were. And, How can one forfeit an estate which he hath not? as here he hath not who levied the fine. And it hath been held in this court, by LORD DYER and others, that if he in remainder for life levies a fine *sur consance de droit come ceo, &c.* that it is not any forfeiture;

1. Wood's Con. 81. 501. 578.

for

for it is but as a release: and therefore 10. *Edw. 4.* rent cannot be reserved upon such a fine; and there is not any book that it should be a forfeiture.

BUCKLER
against
HARVY.

ANDERSON, *Chief Justice.* It is clear that it is a forfeiture; and it is not by reason of any estoppel, but by reason of the prejudice to him in reversion: and although the tenant for life hath but a right, yet when he hath levied a fine, he in the remainder might enter presently for the forfeiture upon the disseisor; but if he had released by fine, there should not be any forfeiture, but by that fine levied every one should be concluded, but that he gave a fee by the fine; and it is not material, although that he in remainder be a stranger thereto: as if a stranger brings waste against tenant for life, and he pleads *nul waste fait*; or if tenant for life prays in aid of a stranger, he in remainder is a stranger to these records; yet he shall take advantage in regard of the prejudice to the reversion. For the first point I doubt; but I conceive the grant to be void; and that he by his entry is a disseisor.

Co. Lit. 232. a.

BEAUMOND, *Justice.* The grant is void: for if the estate had passed by the livery, it had been clearly void; and the same law is here; for the *habendum* is not void otherwise: but in regard that no estate is limited in the premises; and because the *habendum* limits the estate, and all the estates depend upon that which is void, and the grant being void, the grantee by his entry is a disseisor; and yet there shall be a forfeiture of the tenant for life, in regard he presumed to give a greater estate than he had. Wherefore, &c.

OWEN, *Justice,* was absent in the dutchy chamber, and it was there adjourned.—But afterwards, *Pasch. 38. Eliz.* upon these reasons it was adjudged to be a forfeiture, and the entry of him in reversion to be lawful (a).

(a) This case was argued in the queen's bench, upon another special verdict, and the Judges there were of the same opinion. Post. 586.

Wentworth against Wentworth.

CASE 19.

DOWER. The tenant pleads, that he by deed indented granted a rent out of that land to the demandant in recompence of her dower, which she accepted, &c. The demandant by replication confesses the grant of the rent and her acceptance; but that in the same indenture there was a condition, that if the rent should not be paid within a month, &c. that the rent should cease, and the deed should be void; and saith that the rent was not paid. Thereupon the tenant demurred.—GLANVILLE, *for the tenant,* argued, that the demandant should be barred; for dower is of common right, and may be assigned in lands, or in rent out of the lands; and the condition annexed to that assignment is void; for she is in *paramount*; as 2 *Edw. 4.* Executor delivers a legacy upon condition, the condition is void. It is not shewn also that she demanded the rent; and then the condition is not broken.—DREW *contra.* The condition is well annexed to the grant, and therefore it is not any bar to her dower; for it is not absolutely, but conditionally assigned; and recompence of dower ought to be as absolute and beneficial as dower itself; and it is not like to a jointure

A grant of a rent with condition that it should cease, and the indenture be void, on non-payment at the day, is not good in satisfaction of dower; but if the demandant has accepted it, and the condition be broken, she shall be restored to her writ of dower, although she has pleaded the indenture as a grant, and not as an assignment.

Post. 642.—Dyer, 361. Noy, 55. 1. Roll. Abr. 684.

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assured

Co. Lit. 34. b.

WENTWORTH
against
WENTWORTH.
Co. 4. 2. b.

assured upon a condition (as *Vernon's Case* is), which may well be, because the statute makes it a bar if she accept thereof: here also needeth not any demand; because she is not to defeat an estate thereby, nor is the non-payment thereof penal.—WALMSLEY. As this case is pleaded, there is not any assignment of the rent for the dower; and therefore it is not any bar of dower; for it is pleaded, *quod dedit et concessit unum annualem redditum*, &c.; and although *dedit et concessit* are good words in the deed, yet when the tenant is to plead it, he is to plead it in apt words, viz. *quod assignavit*; for a gift of rent or land is no bar to dower: and to that purpose I have seen a case in the years of *Edw. 2.* in the book at large, where it was pleaded, that the son granted land in dower to his *feme ex assensu patris*: and ruled that it was not good; for it ought to have been *assignavit*; for in pleading every one ought to plead according to law: and as it is here pleaded, the *feme* may have a writ of annuity upon this grant, which she cannot have if it were an assignment; and the words of the deed being *dedit*, &c. the intent of the parties to have it a grant doth thereby appear; as also by annexing a condition thereto; for it is clear that a condition cannot be annexed to an assignment of dower; and the tenant against whom it is hath pleaded it as a grant; and if he hath election to use it as he will (as in many cases a man shall have), yet he hath here made his election to have it as a grant; and we may not take it otherwise: and as to the demand, it needed not, when she is not to destroy the estate; for the condition being, that if the rent be not paid, it shall be void, it is penal to the heir, for then she shall be restored to her dower; and therefore the heir shall do the first act by his tender, and therefore it was adjudged in a case wherein I was of counsel in this court: a devise made of a rent out of land to one, and a devise of the land itself to another upon condition to pay the rent, the devisee of the land ought to pay the rent without demand in salvation of his land.—BEAUMOND accord. I agree that an assignment of land for dower, or of rent for dower, ought to be absolute; for the rent comes in place thereof, and shall be of the same nature; and the annexing of a condition to the assignment of dower is void: but here is not any assignment, but it is a mere grant; and there needs not any demand, because the *feme* is not to defeat any estate by the non-payment. Wherefore, &c.—OWEN. The pleading *quod dedit et concessit* is good in substance, but not in form; for it ought to have been pleaded *assignavit*: but although he hath not done so, it is good in law; for a gift in recompence of her dower is an assignment; and although it be good in form, yet it is not material, for that the other hath not demurred for this cause; but for the condition it is void, for the reasons before alledged: but if it had been good, it ought to have been demanded; for upon the non-payment the *feme* is to take the land from the heir, for she shall be restored to her writ of dower. Wherefore, &c.—But WALMSLEY and BEAUMOND continued their former opinion, for it is not form but substance; for the deed shall not be taken in any other manner than as he pleads it, which is not any assignment: the condition also is not annexed to the land, but to the grant; and for the condition broken she is not to have the land, but only to be restored to her action to demand her dower; wherefore there needed not any demand.—ANDERSON

Harg. Co. Lit.
34. b. note
(11).
See Pearson v.
Pearson, 1.
Brown's Ch.
Cases, 232.

was absent, and it was therefore adjourned.—Afterwards, *Pasch.* 38. *Eliz.* it was moved again; and then it was adjudged accordingly for the demandant.

WENTWORTH
against
WENTWORTH.

Baldwin against Smith.

CASE 20.

Trinity Term, 36. *Eliz.* Roll 1676.

REPLEVIN. The issue was, Whether the land was the freehold of one *Kent*? Upon special verdict it was found, that *Francis Archer* was seised of this land in fee holden in socage, and devised it to "*Robert Archer* his son for life, and after to the right "and next heir male of the said *Robert*, and to the heirs males of "the body of such a right and next heir male of *Robert*;" and found further, that at the time of this devise, *Robert* had issue *John* his eldest son. The devisor died; *Robert* entered, and infeoffed *Kent* with warranty; *John* enters; *Kent* re-enters after *Robert's* death; and *John* re-enters upon him, &c. *Et si* upon all this matter, the estate of *Kent* be lawful or not, and that *John* is to be barred? was the question.

If a devise be made to "*A.* "for life, and to "his right and "NEXT HEIR "MALE, and "the heirs male "of the body of "such right and "next heir," *A.* takes an estate for life, and the remainder over is contingent, though he has a son living at the time of the devise: if, therefore, *A.* enters and makes a feoffment in fee, the remainder is destroyed. Ante, 314.

First, Whether this be an estate tail, or for life only, in *Robert*?

Secondly, Whether this warranty descending upon *John*, being an infant (as it was found he was), shall bind him, because he could not enter during the life of his father?

Thirdly, The warranty descending, and the right of remainder vesting all at one time, Which of them shall be preferred?

DREW, for the avowant, moved, that it is an estate tail in *Robert*, because the remainder is limited to his next heir male immediate; as in the case 39. *Assise*, devise to one *et uni haeredi de corpore, &c.* was taken to be an estate tail; the remainder also should otherwise be in abeyance, which the law avoids: if it also were not an estate tail, it is void; for the remainder shall never be *in esse* during the particular estate.—But **ALL THE JUSTICES**, **OWEN** *absente*, held, that *Robert* the father had but an estate for life; for so are the words plainly; and the right heir shall take it as a purchaser.—**BEAUMOND** held, that *John* shall take it, and the remainder shall vest in him presently, living the father; for the remainder is limited "to the right and next heir of the father;" which words being in a will shall be taken according to the intent of the devisor, *viz.* to him who was then heir-apparent; for he is, in the intention of a plain man, the right and next heir.—But **ANDERSON** and **WALMSLEY** against him in this point, and that this remainder should be expectant: but it was admitted by them, that this remainder being depending upon an infant, is good enough.—**ANDERSON** held, that the warranty should not bind; for a warranty shall not bind a right, but where he who should be bound thereby had time to avoid it by his entry: and therefore it was adjudged in the queen's bench, where land was given to *baron* and *feme* for their lives, the remainder to the next heir male of the body of the *baron*, the remainder to the *baron* and *feme* in tail, the *baron* levied a fine with warranty, that the fine should not bar the heir male, for he had not time to avoid it during the life of the *baron*.—**WALMSLEY** held, that this feoffment of itself destroys the remainder, so as it never shall come *in esse*; the warranty also destroys the remainder, and it is not like to a former right: and if the making of a collateral warranty be a *tort*, it is before the right accrued unto him; and therefore the remainder here is not to be

1. Co. 66. b.
Co. Lit. 22. a.
Moor. 593. 104.
Hob. 338.
6. Co. 17.
2. Leon. 219.
1. Roll. Ab. 817.
3. Lev. 433.
1. Vent. 216.
229.
2. Sid. 67.
3. Willf. 300.
Fearn. 102. 241.

BALDWIN
against
WILL.

1. Co. 66. b.

regarded as an ancient right. And I have the report of a case in this court, where a *feme-tenant* for life, the remainder to the right heir of the *baron*, the *baron* made a feoffment with warranty, the opinion of *Dyck* and others was, that the right heir of the *baron* should be bound thereby.—BEAUMOND. The warranty cannot bar, if there be a remainder in expectancy; because a warranty ought always to bind him who hath right of entry or of action: and here he hath not any of them in his father's life-time, but the feoffment of itself destroyed it, because it never came *in esse*. *Et adjournatur*.—Afterwards in *Trin.* 38. *Eliz.* it was adjudged for the avowant, that this remainder by this feoffment and warranty (a) was destroyed and barred. *Vide* 1. Co. 66.

(a) See 4. Ann. c. 16. s. 21. 2. Will. 322.

CASE 21.

LONDON is not
a market overt
as to goods pri-
vately or im-
properly pur-
chased.

5. Co. 83.
Pop. 84.
1. And. 344-
Moor, 360.
Cro. Jac. 63.

ACTION SUR TROVER.—A prescription was alledged, that every shop in *London* should be said to be a market overt for all wares there sold; which the Court upon the first motion conceived to be too general and unreasonable a custom.—ANDERSON said, it had been agreed, that if one buys in a shop any thing which appertains not to his trade, as to buy plate in a mercer or draper's shop, it is not a *market overt* as to that purpose; so if the sale be in a back shop, or in another place not open, no property shall be changed by such sale.

See 1. Jac. 1. c. 21. Stra. 1187. 1. Peer. Will. 8. 3. Atk. 44.

CASE 22.

Entry conge-
able.

Ante, 205.

BROWNLOW, the *prothonotary*, shewed me a record, *Trinity Term*, 37. *Eliz.* Roll 927. in C. B. *Fox v. Carlyne*, where upon a special verdict the case was, That one devised land for years to *J. S. reddend et solvend 20 s. annuatim at Mich. to J. D.* and for non-payment of that sum the heir entered, supposing that those words made a condition, and that the condition was broken, and that he therefore might enter. And his entry was adjudged congeable.

CASE 1.

Neither debt nor
assumpsit will lie
against an exe-
cutor upon a
promise of the
testator's in
consideration of
marriage.
Ante, 121.
Post. 459.

4. Co. 93.
9. Co. 87 a. con-
tra.
Cecw. 284-375.

Stubblings against Rotheram.
Michaelmas Term, 37. & 38. *Eliz.*—In the *Exchequer Chamber*.
ERROR upon a judgment given in an *assumpsit* against an executor upon a promise of the testator's. Where the plaintiff declared, that the testator in consideration of marriage promised to pay to the plaintiff an hundred pounds; and for not performing this promise brought the action; and judgment there given for the plaintiff. And this matter was assigned for error, That the action lay not against an executor.—And all THE JUSTICES and BARONS (except CLERK, *Baron*) held it to be erroneous, for this cause. For ANDERSON said, the reason why *debt* lies not against an executor upon the contract of the testator's, is because the law doth not intend that he is privy thereto, or can have notice thereof; and he cannot gage his law for such a debt as the testator might: and when debt will not lie, it is not fit that this action upon a bare promise should tie him; for it stands all upon one reason; and if these actions should be allowable, it would be very mischievous. Wherefore the judgment was reversed.—*Quare*, Whether a recovery in this action against an executor is allowable against a debt

debt upon an obligation, if it should be an administration; for it would be then mischievous to creditors; and if it should not be an administration, it would be then mischievous to executors, that they should be charged therein, and have not allowance thereof against other creditors; for it may be that at the time of the recovery they did not know of other debts.—NOTE. This Term the like judgment was given betwixt *Gryggs and Helhouse*, in an action brought against an administrator upon a promise of the intestate's to pay monies, &c.

STUBBINGS
against
ROTHERAM

Chamberlayn against Nichols.

CASE 2.

ERROR upon a judgment in debt upon an obligation. The error assigned was, Because the obligation being single, the defendant pleaded payment without an *acquittance*; and issue taken thereupon, and found for the plaintiff, and judgment accordingly; whereas it is not any plea, and so the issue taken upon a void and no plea, and therefore an ill and void trial; and therefore the judgment thereupon is erroneous.—BUT ALL THE JUSTICES and BARONS held, although it were an *ill plea* (a), upon which the plaintiff might have demurred, yet an issue being taken and found by verdict, it is holpen by the statute; and the truth is, there was not any payment: wherefore the judgment is well given accordingly. And the judgment was affirmed.

The plea of payment without an acquittance to debt on a single bond is bad upon demurrer, but good after verdict.

Ante, 157. 228.
259. 367. 440.
Post. 456. 458.
697. 777. 716.;
884.

5. Co. 43. a. Cro. Jac. 86. 312. Ld. Raym. 90.

3. C. Moor, 632.

(a) A void plea is not aided by 32. Hen. 8. c. 30. 1. Com. Dig. 333.

Philips against Sackford.

Easter Term, 36. Eliz. Roll 488.

CASE 3.]

ERROR of a judgment in an *assumpsit*. Where the plaintiff declares, that in consideration the plaintiff would forbear to sue one *Brediman* for twenty pounds debt which he owed unto him, that he assumed to pay the aforesaid twenty pounds before *Michaelmas*; and alledgeth *in facto*, that from the time of the *assumpsit*, *abstinuit* from suing him, *et adhuc abstinet*; and after *non assumpsit* pleaded, and found for him, it was adjudged for the plaintiff.

A promise to forbear indefinitely is not a good consideration in *assumpsit*; but where a time certain is named for payment, a request before the day is not necessary.

The First Error assigned was, Because he alledgeth not any request, but generally *licet sepius requisitus*, &c.—*Sed non allocatur*; for where a time certain is limited for the payment of any thing, he never shall alledge a request before the day; but otherwise it is where it is incertain.

A SECOND ERROR assigned was, That the consideration that he would forbear, &c. and sheweth not for what time, is not a sufficient consideration; for it may be, that he forbore but for a quarter of an hour, or other small time: and although it were alledged *quod abstinuit, et adhuc abstinet*, that will not help it.—And of that point THE JUSTICES doubted; but the greater part held, that it was not a sufficient consideration. *Sed adjournatur*.—And afterwards for this cause it was reversed.

Post. 561.
Ante, 387.
2. Cr. 683.
Ante, 19.
2. Cr. 683.
1. Rol. 27.

Bingham against Smeatkwick.

Hilary Term, 37. Eliz. Roll 362.

CASE 4.

ERROR of a judgment in an *ejectione firmæ*. Where S. declares of a lease of *Will. Yerbury*, 13. April, 36. Eliz. of the lands in pleading question for three years.

Special

BINGHAM
against
SNEATKWICK.

The defendant saith, that long time before *Will. Yerbury* the lessor had any thing, one *Thomas Chaffyn* was thereof seised in fee, and 25. *March*, 24. *Eliz.* let them to *John Yerbury* for twenty-one years; which *John Yerbury*, 3. *April*, 32. *Eliz.* let them to *Will. Yerbury* for eight years, if one *Arthur Yerbury* should so long live; that the said *W. Yerbury* being so possessed, the reversion over to *John Yerbury*, that *John Yerbury*, the 11. *July*, 33. *Eliz.* died intestate; that administration of all the goods of *John Yerbury* were committed by the archbishop of *Canterbury*, because he died possessed of divers goods in divers dioceses within the province of *Canterbury*, to *Henry Blake*; that *William Yerbury* so being possessed, let, as it is alledged in the declaration; that afterwards, viz. 15. *April*, 36. *Eliz.* *Arthur Yerbury* died; whereupon the defendant, as servant to *Henry Blake*, and by his command, ejected him. *Et hoc, &c.*—The plaintiff replies, confessing the lease to *John Yerbury*; but further saith, that the said *John Yerbury*, 30. *Jan.* 30. *Eliz.* granted all his interest to *Arthur Yerbury*; that the said *Arthur Yerbury*, 31. *July*, 35. *Eliz.* died intestate; that the archbishop of *Canterbury*, 27. *Aug.* 35. *Eliz.* committed the administration of all the goods of *Arthur Yerbury* to the said *William Yerbury*, who by force thereof entered and made a lease *prout* in the declaration, &c.; and traverses, that the said *John Yerbury* let it to *Will. Yerbury* for eight years, *prout* in bar.—Upon this issue was joined, and found for the plaintiff, and judgment given for him.

The Error assigned was, That he had traversed that estate which was an estate determined, and by him in his replication avoided before; for he in his replication affirms, that the said *John Yerbury*, 30. *Eliz.* &c. (which is before the lease alledged to be made to *Will. Yerbury*) had granted all his estate to *Arthur Yerbury*, under whom he made title; then although afterwards he makes this lease to *Will. Yerbury*, it is not material, so he hath well avoided it; then the traverse is idle, and issue joined upon a vain matter; and then the verdict thereupon ill, and the judgment erroneous; and therefore it is like an issue taken upon a colour given in an action of trespass, that if it be tried, yet it is a jeofail, and not remedied by the statute.

Post. 651.

BUT ALL THE JUSTICES and BARONS, except *WALMSLEY*, held, that although it be an ill traverse, and an ill issue joined (as it is agreed by them all that it was), yet being tried, and verdict given, it is aided by the statute of jeofails, and the judgment thereupon is well given.

A SECOND ERROR assigned was (but that was *ore tenus*), That in the replication the plaintiff hath not made any good title; for he conveys to himself title as administrator of the goods of *Arthur Yerbury*, committed unto him by the archbishop of *Canterbury*; and he doth not shew that the archbishop was ordinary, nor that the intestate had goods in divers dioceses; and if he had not, the archbishop had no authority to commit administration; and then he hath not any title, and judgment ought to be given against him.

BUT ALL THE JUSTICES, except *WALMSLEY*, held, that in regard it was in the replication, and but the inducement of a traverse, wherein if he had not made any title at all, but had said, that *Will. Yerbury* made the lease unto him *prout* in the declaration,

tion, and traversed, ABSQUE HOC that *J. Yerbury* let unto him during the life of *A. Yerbury*, it had been good enough; wherefore the making of an insufficient title in his inducement to the traverse is not material, especially being after verdict found: but they held, that such manner of pleading had not been good, unless he had averred, that he had assets in divers dioceses; or that it was within the diocese of *Canterbury*, or that he was *loci illius ordinarius*; but for the reasons aforesaid the judgment was good enough, and not to be reversed.

But it was moved by COKE, the *Queen's Attorney*, that the committing of administration being by the archbishop, although he had not goods in divers dioceses, because it is in his province wherein he hath jurisdiction, is *not void*, but *only voidable* by sentence; and it is not like to an administration committed by another bishop of the goods of a man who died in another diocese, or who had goods in divers dioceses; and this difference hath been taken and agreed in the queen's bench, and therefore the plea is well enough.—But THE JUSTICES said, that it was all one, and that the administration is void in both cases, and not avoidable only. But yet for the reasons aforesaid, they held that it was not error; but the judgment was affirmed. *Vide 30. Hen. 6. pl. 13. Plowd. 277. 10. Hen. 7. pl. 8. 5. Co. 30.*

BINGHAM
against
SMEATKICK.

Ant. 6.

An administration by an archbishop, where there are not bona notabilia to warrant it, is void.

Ante, 283. 315. 456.

5. Co. 30.

8. Co. 135.

Lut. 30.

2. Leon. 155.

1. Salk. 39.

Peetre Will. 43.

767.

Hilary

Hilary Term.

38. Eliz. In the Queen's Bench.

*Sir John Popham, Knt. Chief Justice.**Sir Francis Gawdy, Knt.**John Clench, Esq.**Edward Fenner, Esq.**Sir Edward Coke, Knt. Attorney General.**Sir Thomas Fleming, Knt. Solicitor General.*} *Justices.*

CASE I.

Corbyson against Pearson.

If issue be joined upon a prescription which on demurrer would be bad, it will be aided after verdict by 32. Hen. 8. c. 30. Ante, 445. 455.

1. Co. Dig. 331.
Gilbert's C. P. 138.
2. Saund. 324.

TRESPASS for the taking of his beasts, viz. four cows, in a place called *Breachleys*, and chasing and impounding them without cause. The defendant justifies, as in his freehold, for *damage feasant*. The plaintiff by replication shews, that he is, and time whereof, &c. was seised of a messuage and twenty acres of land in *D.* and that he and all whose, &c. have had from time, &c. common for all his beasts *levant et couchant* upon the said tenements, &c. in the place WHERE, every year after the sown corn was severed and carried away until it was re-sown; and that he there, after the corn was severed and carried away, put in his said beasts into the place WHERE, &c. *utendo communia sua prædicta, &c.* The issue was taken upon the prescription, and found for the plaintiff: and now moved in arrest of judgment, that the replication was not good; and so the plaintiff ought not to have judgment, because he saith, that he put in his cattle after the corn severed and carried away, and saith not that it was before the land was re-sown; for otherwise he had no title to common.

SECONDLY, Because he avers not that those cattle were *levant et couchant* upon the land aforesaid; for otherwise he cannot use common with them, nor hath not sufficiently intitled himself to put them in; and in proof thereof vouched 10. Edw. 3. pl. 56. and the *Precedents in the Book of Entries*, "*Trespass in Common*," 9. & 11. — But all THE JUSTICES held, that in regard issue is taken upon the prescription; although peradventure the plea is ill, and ought to be adjudged against the plaintiff, if he had demurred thereupon for this cause; yet it now shall be taken to be good enough, and to be holpen by intendment, when it is said that he put them in *utendo communia sua prædicta*, that it was at such a time as the common is to be used, and with such beasts as are there to use the common. Wherefore, without any great argument, because it was after verdict, and might be well intended, and so aided by the statutes of *jeofails*, it was adjudged for the plaintiff.

Serle

Serle against Roffe.

CASE 2.

ERROR of a judgment given in the queen's bench upon an *assumpsit* against an executor. And declares, that the testator, in consideration of such a marriage, assumed to pay to the plaintiff twenty pounds. The error assigned was, Because this action lies not against an executor for the non-performance of the testator's promise.—And for this cause the judgment was reversed.

Assumpsit does not lie against an executor on the promise of his testator.

Ante, 121. 454.

Vide contra,

Cowp. 375.

CASE 3.

Fenner against Plasket and Green.

Michaelmas Term, 37. & 38. Eliz. Roll 290.

RESCOUS. The plaintiff declares, that a rent-charge in fee was granted to the *feme* of the plaintiff, and to *Ed. Cofins* her first husband; and that *Ed. Cofins* died, and she took the plaintiff to husband; and for rent arrear *durante viduitate* of his *feme* he distrained; and upon *rescous* brought this action. The defendant hereupon demurred in law; but shewed not any cause of his demurrer. But the principal cause (as I heard) was, that his *feme* was not joined in the action; the distress being taken for rent due *dum sola fuit*.—But notwithstanding it was adjudged for the plaintiff; for it is a *tort* done to the *baron*, for which he might have an action sole, or may join his *feme* therein, because it ariseth upon a duty due unto her before the coverture; but it is at his election.

In an action for a *tort* which prejudices a remedy by husband and wife, the husband may sue alone, or they may join.

Moor, 422.

Cro. Car. 419.

2. Inst. 563.

Strange, 229.

1. Bac. Ab 304.

Rolls against Germine.

Ante, Page 425. Case 34.

CASE 4.

THE case being now moved again, GAWDY continued his opinion, that debt lies not against an executor upon a simple contract with the testator, although he acknowledgeth the contract, or admits thereof; but the Court *ex officio* ought to abate the writ. But POPHAM and FENNER *contra*.—But then there was another matter moved, that this action of debt would not have lain if it had been brought against the testator himself for part thereof, *viz.* for so much as he expended as solicitor in suits in the queen's bench; for those are not allowable by the law, for such fees which he expends in such business, and therefore no action lies for them; but an attorney in such cases where he is attorney, may lay out fees, and have debt for them (*b*).—And of this opinion were POPHAM, CLENCH and GAWDY; but FENNER doubted thereof.—Afterwards, in *Pasch.* 38. Eliz. being moved again, they held their opinion, that for those fees the action lay not; so the writ was abateable in all: and therefore they gave rule, that if other matter were not shewn the fourth day in *Trinity Term* following, that judgment should be reversed.

An action of debt will not lie by an attorney of C. B. against an executor upon a contract of the testator for fees in C. B. and also for soliciting causes in B. R.

Post. 760. 804.

1. Saund. 286.

Moor, 356.

Cro. Jac. 521.

Cro. Car. 159.

Cowp 375.

(*b*) But now by 2. Geo. 2. c. 23. s. 10. an attorney may practise in other courts than that in which he is admitted.

Wilson against Packman.

Hilary Term, 37. Eliz. Roll 416.

CASE 5.

ACTION SUR TROVER and conversion of goods. Upon demurrer the case was, The ordinary committed administration of the goods of an intestate to the defendant; afterwards the next of kin sues a citation in the court christian against the defendant, to repeal that administration; and he *pendente lite* sells upon citation, will authorise all acts done, even *pendente lite*, by the first administrator.

Administration regularly anted, though to an improper person, and eventually repealed.

Ante, 163,

Post. 565.

WILSON
against
PACKMAN.

1. Roll. Ab. 303.
6. Co. 18, 19.
Moor, 396. 630.
Salk. 38.
2. Lev. 90. 55.
Raym. 224.
Brownl. 51.
Cro. Car. 62.
Style, 10.
Latch. 67.
1. Lev. 186.
1. Wood's Con. 88.
2. Stra. 917.
Fitzg. 202.
2. Peere Will. 578.
2. Atk. 285.
Ld. Raym. 684.

those goods; and afterwards his administration is repealed, and administration committed to the plaintiff; who for this conversion *pendente lite* brings this action. It was moved for the defendant, that this action lies not; and the administration at the common law is well committed; and the statute doth not alter the law in this point, but gives a penalty against the ordinary, if he commits them not to the next of kin; and the administrator, until administration repealed, hath an absolute authority to dispose of the goods as he pleases.—TANFIELD *è contra*. The conversion *pendente lite* in court christian is not lawful, but is a tort to the plaintiff, and that the sentence there proves; which is, that all things attempted or done *pendente lite* shall be void; and the Justices ought to have regard to the civil law in this point, as in 27. Hen. 6. "*Gard.*" 118. 2. Rich. 2. "*Quare Impedit*" 143. and 4. Hen. 7. pl. 13. And by the sentence it appears, that the administration is revoked, as if it never had been; and upon this reason it is in Dyer, 339. where an administrator recovered a debt, and afterwards another procured himself to be joined in the administration, and released the debt; and afterwards it being revoked, this release was not any bar to the execution: and Mich. 35. & 36. Eliz. in the common pleas, betwixt *White and Cary*, this very point was in question; and adjudged that the action lay.—GAWDY. The action well lies, for the sentence doth not repeal mean acts done by an administrator, which are for the intestate's benefit: but forasmuch as these goods were not converted or employed for the intestate's use, it is reasonable that he should be charged for them.—POPHAM and FENNER *è contra*. For the administrator hath an absolute and lawful interest and power to dispose of the goods until the repeal be made; and it is not like to an appeal upon a sentence, for that makes it as no sentence: but the appeal of the letters of administration doth not avoid it *ab initio*, and make a lawful act tortious; but rather, in this case, the new administrator shall have an accompt for the monies received. And the words in the sentence are not to be regarded; for they are ordinary in all sentences. So he having the goods lawfully, and converting them lawfully, shall not answer for them as for a tort done.—And POPHAM here said, if administration being committed, the ordinary commits new administration, it is a repeal of the former without any sentence of appeal (a); and if the first administrator waste the goods, the debtee shall have the action against him; and if he pleads that administration is committed over, he may well by his replication maintain it, because he wasted the goods when he was administrator. Wherefore, &c. *Et adjournatur*.—But afterwards the action was discontinued by the plaintiff, 6. Co. 18.

(a) And. 303.
Owen, 50.
1. Salk. 38. Sed
vide ante, 315.
Style, 10. 102.
1. Sid. 409.
1. Peere Will. 42.

CASE 6.

Curteis against Savel and three Others.

If an appellant benon-suited by one appellee, it discharges all the others as to the appeal.
Post. 455.

2. Roll. Ab. 133.
Dyer, 120.
1. Inst. 139.

APPEAL for the death of her husband. Upon several issues pleaded, the plaintiff was non-suited upon a trial against the one; and, Whether that should be a non-suit against the rest? was the question.—And THE WHOLE COURT held it to be a non-suit against them all: wherefore, as to the suit of the party, it was ruled that he should be discharged: but held, that the others who were not tried, should be arraigned upon the declaration at the queen's suit.

1. Sid. 278. 2. Hawk. 283. 304.

Ascue against Hollingworth.

Ante, Page 355. Case 14.—C. B. Trinity Term, 37. Eliz. Roll 392.

ERROR of a judgment in the common pleas in debt. The case was, That *Ascue* was bound to *Hollingworth* in a statute staple acknowledged before the mayor of *Lincoln* in 200 l. and *Ascue* thereto put his seal, and the seal used at *Lincoln* for one hundred years for that purpose was also put thereto; but because it was not enfealed with a seal of two parts, according to the statute of *Acton Burnel*, 13. *Edw.* 1. c. 4. it was ruled in an *audita querela* between the said parties, that it was void as a statute. Whereupon *Hollingworth* brought his action of debt thereupon as upon an obligation: and all this matter being disclosed, and a demurrer joined thereupon, it was adjudged for the plaintiff. *Ascue* the defendant thereupon brought error; and assigned for error the very point in law, that this was not an obligation, and that debt lies not thereupon; and no other cause was moved for error.—And it was now argued by *PUDRY* for the plaintiff, and by *YELVERTON*, serjeant, for the defendant.—*GAWDY* held, that debt lies not hereupon as upon an obligation; for when a thing is void in the principal and superior operation thereof (as it hath been adjudged here, that it is void as a statute), it cannot be good in an inferior: as 33. *Hen.* 8. fol. 50. a pardon of petit-treason was no discharge of murder; and *Blunt v. Andrews*, bargain and sale of land and all the woods and underwoods, the deed not being enrolled, it cannot enure as a grant of the wood: and although the books be, that debt lies upon a statute, &c. yet he ought to declare thereof as upon a record, and not as upon an obligation (and so all the prothonotaries affirmed to have been always their course).—*FENNER* accord. It is not an obligation; for a *non est factum* cannot be pleaded in this action: and although it were sealed by the conusor, it never was delivered by him as his deed; but he only acknowledged it before the mayor, which is not of any effect to make it to be his deed.—*CLENCH*. There are words obligatory in a statute as well as in an obligation; also in the end he binds his lands and goods, and the acknowledgement makes it afterwards to be a statute; so it is an obligation, and more. And *posito*, that he had sealed and delivered it as his deed, and had not acknowledged it, it is no question but it had been a good obligation; and although peradventure it had been a good statute, debt had not lain thereupon as upon an obligation, but as upon a record; yet now when it never was any statute, he conceived it might well be sued as an obligation. Wherefore (*POPHAM absente*) adjournatur (a).

See 23. *Hen.* 8. c. 6. and 27. *Eliz.* c. 4.

Haddon against Arrowsmith.

EJECTIONE FIRMAE. Upon a special verdict the case was, The queen being lady of the manor of *Winterbourne* grants licence by her steward to a copy-holder for life within the manor, to make a lease for three years, *if he live so long*. He lets the land to the plaintiff for three years absolutely, who upon ejection by a stranger brought this action.—*STEPHENS* for the defendant argued, that this lease was not according to his licence, and therefore it is not warranted thereby; for an authority ought precisely to be pursued, and then an *ejectione firmæ* in this case lies not: for although it hath been here adjudged, that lessee for years of a copyhold but a copyholder *in fee* must pursue a licence strictly. Ante, 395. 451. Post. (469) 483. 535. 676. 717. 728. 1. Roll. Abr. 331. Cro. Jac. 437. Ow. n. 73. Moor, 184. Poph. 105. 4. Co. 26. Gilb. Ten. 214. Cowp. 26. Dougl. 53. 292. 565. 1. T. Rep. 705. 2. T. Rep. 241. 330. 781.

CASE 7.

A statute staple void as a recognizance may be sued as an obligation.

Ante, 355.

Post. 494. 544.

S. C. 2. Roll.

Abr. 149.

Gould. 190.

Moor, 405.

1. Hob. 196.

2. Vern. 750.

1. Peere Will.

335.

Cowp. 590.

2. Roll. 56.

(a) Adjudged accordingly, post. 494. 544.

CASE 8.

If a copyholder for life obtain licence to make a lease for three years, *if he live so long*, and he grants a lease for three years absolutely, yet the lease is good; and the lessee may maintain ejection;

HADDON
against
ARROWSMITH.

which is made without licence of the lord being a common person might maintain an *ejectione firmæ*, because he is lessee, against all but the lord, yet when the queen is signiorea it is otherwise; for the copyholder cannot disseise the queen; wherefore it cannot be a good lease; for nothing passed from the copyholder to the lessee.—ATKINSON *à contra*. For these words, "if he live so long," are but to shew how long the lease is to continue, which is no more than what the law appoints, and therefore good enough. Wherefore, &c.—Of that opinion was all THE COURT; for the limitation, that he shall make a lease for three years, if he so long live, are but words of surplusage, and no more than the law saith; and then the words of the party, "if he live so long," if they had been in the lease, had been vain. The difference in this case will be betwixt a copyholder in fee and a copyholder for life; for if such licence had been granted to a copyholder in fee, and he had granted it for three years absolutely, that had not been warranted by the licence; for the intent was to give him licence, but not to hurt the heir; and without these words in the lease, the lease is good, and shall bind the heir: but it is otherwise of a copyholder for life; for the law without these words determines the lease by his death.—GAWDY said, admitting it to be not warranted by the licence, yet the lessee may well maintain this action; for there is not any difference betwixt a lease made by a copyholder where the queen is signiorea of the manor, and where a common person; for in both cases the lease is good betwixt the lessor and lessee, and against all strangers. *Quod FENNER concessit*, but CLENCH denied, and POPHAM spake not to that point.—And FENNER said, that a lord cannot limit a condition in his licence; for he gives nothing, but only dispenseth with the forfeiture, and all the estate passeth from the copyholder; wherefore he could not annex thereto a condition, no more than the heir might assign dower upon condition, or an executor deliver a legacy conditionally: and POPHAM thereto agreed. But here this is not a condition, but a limitation of the estate, which he might well limit. But in the principal point they all agreed. Wherefore it was adjudged for the plaintiff.

Ante, 451.

CASE 9.

Districcionem
for destructionem
in an original
writ for waste, is
a fatal variance.

Ante, 119.

Smith against Freeman.

ERROR upon a judgment in waste. The writ recites the statute, *quod nullus faciat vestum venditionem seu districcionem*, where it should be *destructionem*. And it was prayed that it might be amended, for it is but the default of the clerk.—And it was held by ALL THE COURT, that it could not be amended, because it is in the original writ. 5. Co. 45.

5. Co. 45. a.

Ld. Ray. 1515. Stra. 787. Cowp. 229. Dougl. 194. 1. Term Rep. 235. 237.

CASE 10.

Green against Wilcoks.

Michaelmas Term, 37. & 38. Eliz. Roll 332.

An executor
may confess a
judgment to one
creditor pending
an action by
another; and on
this judgment
pleaded, the
plaintiff cannot
reply *covin*
without traversing
that it was for a just debt.

DEBT against an executor. The defendant pleads, that hanging this action *J. S.* brought another action of debt for an hundred pounds, true debt of the testator's, which action he had confessed; and that he had *riens inter maynes* beside to satisfy that judgment. The plaintiff, *prætestando* that it was not a true debt, for replication saith, that this recovery was by *covin* to defeat him of his action. And it was thereupon demurred in law, because he ought to answer thereto, if it be a true debt; and if so, it cannot be recovered by *covin*, and so the *covin* is not issuable.—But ALL

705. Sid. 21.

1. Leon. 67.

2. Vern.

Brownl.

103.

Dr. & St. 77.

Moor, 678.

THE COURT held, that the replication was good enough; for if the recovery be not by *covin*, the plaintiff is barrable, and therefore it is the principal matter to be answered; and the conusance of the action is not material, *viz.* whether it be a true debt, and an action truly pursued; and a recovery may be *covinous*, although it be upon a true obligation. As *Mich. 36. & 37. Eliz. in Sarah de Banbault's Case* in this court, where the testator was obliged in an obligation (with an intent to defraud creditors) to pay a thousand pounds; the obligee brings debt thereupon in *Windsor* court against the executrix, and recovered; and it was pleaded in bar here; and the issue was, Whether the recovery were by *covin* by rule of the Court? and found against the defendant; yet there it was a true debt, and judgment given accordingly. So here: wherefore, &c. And the Court moved the parties, that the defendant should pay costs and waive the demurrer.—And afterwards upon a motion it was adjudged for the plaintiff, and error thereof brought, and reversed for the matter in law; for it cannot be a *covinous* recovery if the debt be true, and the *covin* alledged is not material.

GREEN
against
WILCOXS.

Sir Henry Knevett against Pool and Hawkins and Two Others.

CASE II.

Trinity Term, 36. Eliz. Roll 326.

TRESPASS, *quare clausum fregit*, and his corn there growing, cut and carried away. Upon not guilty pleaded, a special verdict was found; and thereupon the case was, "Tenant for life, remainder for life: the tenant for life makes a lease for years to *Hawkins*, who is ousted by a stranger, who commits a disseisin. The disseisor makes a lease for years; his lessee sows the land. The tenant for life dies. He in remainder (the corn not being severed) and the first tenant for years of the tenant for life, the disseisor and his lessee for years enter, and cut and carry away the corn. The tenant for life in remainder brings trespass. *Et si, &c.* And found damages severally for entering into the land, and for the corn carried away."—As to the entering into the land, it was held clearly, that the verdict is against the defendant; for although some of them had title to have the corn, and the others in aid of him might come and enter upon the land to carry the corn away, yet that is by liberty in law, which ought to have been pleaded, and cannot be given in evidence, nor shall be holpen upon the verdict. And THE WHOLE COURT was clearly of that opinion. Wherefore as to that the plaintiff should have judgment.

A licence in law must be pleaded, and cannot be given in evidence.

As to the corn, TANFIELD, for the plaintiff, argued, that they appertained to him in remainder, and not to the lessee for years of the tenant for life; nor to the disseisor nor his lessee. 1. To *Hawkins*, the first lessee, they appertained not, because they did not sow them at his own cost, nor was in possession of the land at the time of his estate determined; and the sole reason why a lessee whose estate is determinable upon an uncertainty shall have the emblements, is, because as they arise out of his labour and costs, the law gives him that privilege after the determination of his estate; which is the reason given in *Broke, "Emblements," pla. ultimo*; but if he were not at the cost and labour to sow it, he shall not have the corn, but he who should have the land shall have the corn; for *quicquid plantatur solo, solo credit*; and therefore if a man sow land, and

If the lessee of a tenant for life be disseised, and the lessee of the disseisor sow the land, and then the tenant for life dies, and he in remainder enters, yet he shall not have the emblements, but the lessee of the tenant for life. Ante, 61. 460.

S. C. 5. Co. 85. a. Dyer, 31. Co. Lit. 55. Winch. 51. Godb. 159. 1. Ccm. Dig. 599. 3. Wilf. 271. Dougl. 283.

KNEVETT
against
POOL and HAW-
KINS and two
Others.

Hob. 132.
3. Roll. Abr.
727.

3. Roll. Abr.
727.

lets it for life, and the lessee for life dies before the corn be severed, his executor shall not have them, but he in reversion; but if he himself sowed the land and died, it were otherwise. So if tenant for life sows the land, and grants over his estate, the grantee dies before the corn severed, his executor shall not have the corn: which cases GAWDY and POPHAM agreed. So *Mich. 29. & 30. Eliz.* there was a case in this court, where a man sowed his land, and devised his lands for life, remainder in fee; tenant for life dies, the corn not severed; the question was, Whether the executor or he in remainder should have it? and held that he in remainder; which case they all agreed: then here this reason is strong against the first lessee that he should not have it. But if he had entered, living the tenant for life, and had continued his possession until his death, it had been otherwise; for then it shall be construed, as if he always had continued in possession, and had sown it himself; but when he did not enter, it was his folly and his *laches* to prejudice himself: and the disseisor nor his lessee for years shall not have them; for their estate is uncertainly determinable by their own *tort*, which the law will never regard, nor give any privilege thereto. Wherefore, &c.—But ALL THE JUSTICES (*absente* CLENCH) resolved to the contrary, that the corn appertained to *Hawkins*, the first lessee of the tenant for life; for he having right to it at the time of the death of the tenant for life, the law shall preserve his title and right as if he had entered. For GAWDY said, if he had entered in the life of the tenant for life, it is clear that he should have had the corn. Now when he could not enter, the law supplies his entry: as 19. *Hen. 6. 28.* “*Tenant pur autre Vie*” is disseised; he shall not have trespass for the mean profits until the re-entry; but if *cestuy que vie* dies, so as he cannot re-enter, the law shall give him the action without re-entry. Then lessee for years having right to have them in the life of the tenant for life, it is not reason it should be taken from him by the uncertainty of the death of the tenant for life; wherefore he in the remainder hath no right to have them; wherefore he should not have his action against the defendant: and it was therefore held, that the plaintiff had no cause to recover.—And afterwards *Pasch. 38. Eliz.* their opinion being again delivered openly in court, it was commanded that judgment should be entered for the defendant, if other causes were not shewn to the contrary by the last day of the Term: and it was adjudged accordingly. 5 *Co. 85.*

CASE 12.

Penryn against Corbet.

Trinity Term, 37. Eliz. Roll 504.

In an appeal of murder, the jury may acquit of the murder, and find not guilty generally, or guilty of the homicide; and being a verdict for the crown, and not for the party, it may be pardoned, but the appellant cannot enter a *nonfuit*, though he may a *retraxit*. Ante, 276. 460. Post. 632. Moor, 407. Noy 88. Latch. 173. 5. Co. 50.

APPEAL of murder, of the death of his brother. It was tried by *nisi prius* in London; and all the Justices of the king's bench sat upon it in the Guildhall in London. The jury found him not guilty of the murder, but guilty of homicide: and this by advice of the Court they might well do; and they might if they would (if they thought him not guilty of the murder) have found him not guilty generally, and not have spoken of the homicide; and it is at their election in this case how they will give their verdict. Afterwards this matter was moved in court, Whether this verdict was well found, and should be a conviction for the homicide?—POPHAM said, that it was so ruled by the

advice of all the Justices of England in *Stowel's Case*. *Vide the Case of Wrott and Wiggs*, where the jury found him not guilty generally, and would not find him guilty of the homicide, although the evidence was pregnant, that he was guilty thereof; yet it was good by the advice of all the Justices of both benches. The defendant then pleaded the queen's pardon, and prayed to have it allowed: and a precedent was shewn, *Pasch. 8. Eliz. Rot. 33. Musgrave's Case*, where the defendant pleaded the queen's pardon in this very case, and it was allowed; although in *9. Eliz. Dyer, 261.* there was a *quere* thereof.—But POPHAM said, it was a strong precedent; for it is hard the queen should pardon that which is the suit of the party; and there is no question if it had been an appeal of homicide, as it well might, the queen could not have pardoned it: whereto COKE, the Queen's Attorney, of counsel with the defendant, agreed; for it is merely the suit of the party. But here the suit of the party is an appeal of murder, and that wherein he is found guilty is not for the party, but for the queen; wherefore the Court would advise thereof until the next Term.—Afterwards, *Pasch. 38. Eliz.* the plaintiff being compounded with, would have been nonsuited. And the Court doubted whether it might be allowed, being after a general verdict, although it were in another Term. It was then prayed that a *retraxit* might be entered thereof, And therein also the Court doubted whether it might be (a); but they would advise.

(a) See 2. Hen. 4. c. 7. 2. Hawk. 267.

Wilkinson's Case.

WILKINSON by colour of a writ *de vi laicâ removendâ* awarded out of the chancery, returnable in this court, was put out of possession by the sheriff, and the possession by that means gotten by his adversary.—And this being suggested to the Court by affidavit, restitution was awarded: and to that purpose a precedent was shewn, *35. Eliz. Rot. 66.* between *Erkensfall and Palmer*, for the parsonage of *Wiberton* in the county of *Cambridge*: in such case, upon such a suggestion, restitution was awarded.

CASE 13.

The Court may award restitution where possession is colourably obtained.

Moor, 462.

Walter against Dawes.

Trinity Term, 37. Eliz. Roll 458.

ASSUMPSIT as executor to *Robert Walter* his father. For that whereas the said *Walter*, the testator, was Justice of assise in the county of *Glamorgan*, and two other the adjoining counties, and that every Justice of assise there had used time whereof, &c. to appoint an officer called the clerk of his fines, who hath the ingrossing of all fines within the said circuit, and had 5s. for the ingrossing of them; the defendant, in consideration that the testator would appoint him to that office, assumed to pay unto him twenty marks *per annum*, *quamdiu* he should exercise it; and that the testator appointed him to that office; and that he executed it for three years; and for non-payment of these twenty marks *per annum*, for the three years, he brought the action. The defendant pleads, that he did not exercise that office: and issue being joined thereupon, and tried by a *visne* of *D.* in the county of *Worcester*, where the action was brought, and found for the plaintiff, this matter was alledged in arrest of judgment; Because this office by intendment

CASE 14.

A Judge of assise cannot prescribe for the appointment of an officer to ingross his fines within the circuit of which he is Judge; but if an action lay, it must be tried where the office is exercised.
2. Roll. Ab. 599.
Gould 180.
Moor, 412.
Cowp. 47.

WALTER
against
DAWES.

is to be exercised in the counties in *Wales*; and then the trial ought to have been in the county of *Hereford*, being the county next adjoining, and not in the county of *Worcester*.—And of that opinion was THE WHOLE COURT; for although the office might be exercised in any place by ingrossing the fines in any place; yet it shall not be so intended to be out of the circuit, unless it be expressly shewn. They also held, that this was not any office, and therefore the appointing him to be his clerk of the fines is not any consideration to maintain this action. Wherefore without further argument it was adjudged for the defendant, *absente* GAWDY.

CASE 15.

A husband is not intitled to a term granted to another in trust for the use of his wife.

1 Rol. 346.

Co. Lit. 351. a.

Wytham against Waterhouse.

A LEASE for years was granted to the defendant to the use of the grantor's sister, whom he afterwards should marry; and he married her accordingly, and then died. The *feme* takes the plaintiff to husband, and afterwards she died. The defendant takes administration of the plaintiff's wife's goods. The plaintiff sued the defendant in chancery to have this Term.—And it was there decreed, by the advice of ALL THE JUSTICES of *England*, that neither the term nor the use thereof appertained to the plaintiff.

CASE 16

Corbet against Cook.

Michaelmas Term, 37. & 38. Eliz. Roll 602.

If a sheriff take bond for appearance at *Westminster*, and the Term be adjourned to *Hertford*, yet the defendant must appear where the court is held out of which the writ issued. Moor, 450. See 1. Com. Dig. 235.

Appearance must be entered.

DEBT upon an obligation conditioned, that if he appeared at *Westminster* such a day, to answer, &c. that then, &c. (this was a sheriff's bond). The defendant pleaded, that before the day of the return of the writ, the Term was adjourned to *Hertford*; and that there he appeared; and thereupon the plaintiff demurred.—It was first moved, Whether this plea were good, the obligation being taken (as by intendment it might be) after the adjournment of the term, whether he ought not to appear at *Westminster* or at *Hertford*? But it was held, that the obligation shall always relate to the day and place comprised in the writ; for that shall not have regard to the adjournment: and yet if the Term be adjourned he ought to appear in the queen's bench, or otherwise he shall forfeit his bond; as 9. *Edw. 4.* is; and so are divers precedents.

SECONDLY, It was moved, that the plea was not good; because he doth not conclude, *prout patet de recordo*; for although he appeareth, yet if his appearance be not entered upon record, he forfeits his obligation, and he ought to conclude so; otherwise the plaintiff cannot have an answer thereto, to say *nul tiel record*.—And of that opinion was all THE COURT.

CASE 17.

Nector and Sharp, Executors of Thrower, against Gennet.

Trinity Term, 37. Eliz. Roll 178.

A caption upon a *capias utlagatum* made returnable five years after the test is not legal; and it is no escape, tho' the sheriff suffer the prisoner to be at large. Ante, 164. 183. 271. Post, 706.—S. C. Owen, 72. S. C. Gould, 141. S. C. Moor, 413.

PROHIBITION against Gennet and others, wardens of the company of tallow-chandlers in *London*; surmising, that the defendants sued them in the court christian for a legacy of 200l. given to them by the testator of the plaintiff; and that they there pleaded that their testator was keeper of *Ludgate*, and was possessed of goods to the value of 32cl. and no more; and was obliged in an obligation of 1000l. to *Spencer and Massam*, sheriffs of *London*, that he should safely keep the prisoners committed to his charge; and should

should save the sheriffs harmless from all escapes, &c. and shews that one *Helms* was taken upon a *capias utlagatum* after judgment in debt, and escaped; and debt was brought upon this escape against the sheriffs of *London*, and judgment against them; and so the obligation forfeited; so there was *riens inter maynes* more than to satisfy this obligation; and because the ecclesiastical court would not allow of this plea, a prohibition was sued. It was thereupon demurred.—*ATKINSON*, for the defendant, prayed a consultation; for this plea is not any plea; and therefore the court christian which is to take notice of our law ought not to allow it; for the judgment in debt was 20. *Eliz.* and the *capias utlagatum* whereupon he was taken was 25. *Eliz.* so as the plaintiff could not take benefit thereof; for he was not in execution for him; as one taken by a *capias pro fine* after the year and day, is not in execution for the plaintiff; as 1. *Hen. 7. pl. 19.* 36. *Hen. 6. pl. 24. quod fuit concessum PER CURIAM*: and then the obligation is not forfeited, for it is not any escape; and therefore an action lieth not against the sheriffs; and if it be not any forfeiture, it is plain that this legacy shall be first paid. But the legatary by the civil law should enter into bond to make restitution, if the obligation should afterwards be recovered, so there is not any inconvenience to any. And to that the counsel on the other side, and THE WHOLE COURT (except *FENNER*) agreed, that this is no plea unless the obligation is forfeited; but *FENNER* said he doubted thereof.—*COKE*. The difference is, when the obligation is for the payment of a lesser sum at a day to come, it shall be a good plea against the legatee before the day, for it is a duty *maintenant* which is in the condition; as 9. *Edw. 4. pl. 12.* is. But otherwise it is where a statute or obligation is for the performance of covenants, or to do a collateral thing; there until it be forfeited, it is not any plea against a legatee, for peradventure it never shall be forfeited, and may lie *in perpetuum*; and by such means no will should be performed.—*TANFIELD*. The obligation is clearly forfeited; for the condition is, that he shall not suffer any prisoner committed to his prison to escape, and to save the sheriffs indemnified from all escapes, &c. so it is in the conjunctive: and then although the prisoner was not in execution, so as no action of debt lies for the escape, yet being taken by the *capias utlagatum*, the suffering him to escape is a breach of the bond.—*COKE*. It appears by the record, that the *capias utlagatum* was awarded 25. *Eliz.* and was returnable 35. *Eliz.* so merely void, for every *capias* ought to be returnable the ensuing Term, for the mischief which otherwise might befall the prisoner to be kept always in prison, as appears 21. *Hen. 7. pl. 16.* 8. *Edw. 4. pl. 4.* *Dyer*, 175. and then he was never lawfully his prisoner, and might well let him at large.—*FENNER* conceived that being taken by process, he might not dispute whether the process was lawfully or well awarded, but he ought by reason thereof to detain him; and the suffering him to go at large is a forfeiture of the bond. But ALL THE OTHER JUSTICES to the contrary; for although peradventure this arresting by force of this process is excusable in false imprisonment by the sheriff, 14. *Hen. 8. pl. 16.* and 11. *Hen. 4. pl. 36.* yet clearly it is no lawful imprisonment; and as to the benefit or prejudice of a stranger, he shall never be said to be a prisoner; and the gaoler's suffering him to go at large is lawful; and the obligation is not forfeited thereby. Wherefore consultation was awarded.

N ECTOR
and
SHARP
against
GENNET.

1. Roll. Abr. 295. 928.
5. Co. 88. b.
29. b.
21. Hen. 7. pl. 27.
- Dyer, 175.
2. Bull. 256.
1. Salk. 273.
2. Salk. 700.
- Farres, 29.
- Cro. Jac. 289.
11. Mod. 50.
2. Ld. Raym. 772. 775.
2. Bl. Rep. 846.
5. Co. Dig. 178.

CASE 18.

Bowyer's Case.

Hilary Term, 27. Eliz. Roll 750.

On a justification in slander, the *venue* must be where the justification is pleaded.

Ante, 261.

Gould, 188.

Moor, 410.

2. *Hawk*, 429.

3. *Saund*, 247.

ERROR upon a judgment given in an action on the case for words supposed to be spoken at *Bridgnorth*, in the county of *Salop*. The defendant pleads, that he spake them as a witness upon his oath, upon an issue tried at *Chard*, in the county of *Somerset*. The plaintiff replies *de son tort demesne*, &c. and thereupon it was tried by a *venire* of *Bridgnorth*: and error thereof assigned, because it ought to have been by a *visne* of *Chard*, where the justification arose.—And it was held clearly to be a mis-trial, and not aided by the statute of *jeofails*. Wherefore the judgment was reversed.

Vide 21. *Jac*. 1. c. 13. and 16. & 17. *Car*. 2. c. 8.

CASE 19.

Nevell against Sydenham.

An immaterial allegation need not be traversed.

Qu. If during the existence of the feudal tenures, MARRIAGE belonged to the lord *de mero jure*, without any tender?

Ante, 335.

Co. Lit. 82.

5. *Co*. 126. b.

6. *Co*. 70. b.

Cro. Jac. 66.

Dougl. 668.

VALORE MARITAGII, against *John Sydenham and Mary his wife*, daughter and heir of *Buckland*. And declares, That the said *Buckland* held of the queen by knight's service in capite, and died, *Mary* his daughter and heir being within 14 years of age; and that an office was found, and the queen seised the ward, and granted it to *Edward Nevell* his father, who died possessed, and made him his executor; whereby he was possessed, and tendered a convenable marriage to the said *Mary* when she was within age, *viz.* one *Badger*, and that she refused. Wherefore, &c.—The defendant traverseth the tender; and it was thereupon demurred.—After argument by the *Serjeants*, the Justices delivered their opinions severally.—OWEN and BEAUMOND held, that the plaintiff should recover, because the marriage appertaineth to the lord *de mero jure*, without any tender, and that there needed not any tender to be alledged; and when it is alledged, it is not material, for it shall never be traversable: and that there needed not any tender, they relied upon the statute of *Merton*, that the marriage belongs to the lord *de mero jure*, whether she will marry herself or not; so as the lord hath election to have the marriage, or the value of the marriage; and it is *quasi* a service due to the lord by reason of his tenure, which is due of itself without any other act to be done by the lord, as well as his relief or other duty. The difference hath always been betwixt the double value demanded and the single value: in the first, there ought to be a tender of necessity, because he is to have the penalty upon the heir's refusal; but in the other not: it would also be mischievous to lords, if they should not have it without tender; for it may be the heir might be *assigned* or beyond sea at the death of his ancestor, and always after until full age, or a close prisoner by the queen's command, so as the lord by no possibility can make a tender; wherefore being a duty due unto him, it is reason he should have it without a tender; and therefore the traverse is not good, and the plaintiff ought to recover.—WALMSLEY and ANDERSON very strong to the contrary, that there ought of necessity to be a tender, and that it is well traversable; for although the lord is to have the marriage of the heir *mero jure* (as the statute is), it is true: but there he ought to do an act to have it (*viz.* to make tender of marriage); for without tender the heir cannot make a refusal: and it is not reason the heir should pay for the value of his marriage, where peradventure he would willingly have accepted thereof, if it had been offered him. And here ought two things to be done to have the marriage: the one,

one, the lord's tender; the other, the heir's acceptance or refusal; and without the first act done by the lord, nothing accrues unto him; and the payment of the value of the marriage, and that the land shall be retained until he pays the value of the marriage, is a penalty inflicted upon him, as in case of the double value; and therefore it is as good reason that there should be a tender in the one, as in the other case: and the *Register* and *Natura Breuium*, and the *Book of Entries*, are all in point, that tender ought to be alledged; and therefore there is not any reason to say it should be vainly and idly alledged; and the statute of *Merton*, cap. 7. which is, "*si hæres pro domino suo noluerit se martiare*," hath been always expounded, that if upon request he will not marry, &c. so always there ought to be the lord's request. And for the mischiefs, they are rather to be suffered than that the law should be changed; and there would on the other side be as great mischief to the heir; for if he should pay for her marriage without tender, she might peradventure be one of such deformity that none will marry with her; and then what reason is there that he should pay for her marriage.—And WALMSLEY said, in case of a female it is more clear; for the words of the statute of *Westm.* 1. cap. 22. which gives the lord two years, after she hath accomplished her age of 14 years, to tender her marriage, the statute there is expressly, that the lord shall tender her marriage within the time; then against an express statute, it is no reason he should have it without tender. Wherefore, &c. *Et adjournatur*.—See the books cited. *Dyer*, 255. 306. 2. *Hen.* 7. 9. 21. *Edw.* 4. 43. "*Temps*," *Hen.* 8. "*Forfeiture de Marriage*," 7. 40. *Edw.* 3. 6. 31. *Aff.* 26. 35. *Hen.* 6. "*Gard.*" 71. 24. *Hen.* 3. "*Gard.*" 149. 18. *Edw.* 3. 18. 35. *Hen.* 6. 53. (a).

NEVELL
against
STDENHAM.

service is now wholly taken away by 12. Car. 2. c. 24. and converted into free and common socage.

(a) The tenure
by knight's

Wells against Partridge.

CASE 20.

EJECTIONE FIRMÆ of lands in *Uxbridge*. The parties were at issue. Upon the evidence it appeared, that the plaintiff was lessee for three years of a copyholder; and the custom of the manor was proved to be such, that a copyholder there might let the land for three years.—ANDERSON conceived that the lessee of a copyholder cannot maintain an *ejectione firmæ* in any other manner; but if he might, it is clear he ought to shew the estate of his lessor at the first, and the licence of his lessor, and the special custom to warrant that lease; for otherwise being a general count, it shall be intended of a lease at the common law, which a copyholder cannot make: as if the heir in *Borough English* brings a *mort-d'auncestor*, he ought to shew the custom in his count, and declare according thereto. And he held the action to be well maintainable; but he ought to shew the custom, otherwise it is not good. But because there was other clear matter for the defendant, it was passed over, and the verdict found for the defendant.

A declaration in ejection by the lessee of a copyholder must shew the special custom by which the lease was made. *Ante*, 462. *Post*, 483. 535. 676. 717. 728. *Co. Lit.* 398. a. 4. *Co.* 26. *Owen*, 18. *Hard.* 330. *Lutw.* 803. *Gillb. Ten.* 213.

Knight against Rushworth.

CASE 21.

Hilary Term, 38. Eliz.—In the Common Pleas.

ASSUMPSIT. The case was, That one *Mary Rushworth* had entered into a bond of 200l. to the plaintiff; and after gave all her goods to the defendant to pay her debts. The defendant, being of the obligee going before a magistrate and deposing upon oath that it was rightly read over to the obligor, is sufficient to maintain an *assumpsit*. *Ante*, 67. 237.

A promise to pay the bond of a third person in consideration of the obligor, is sufficient to maintain an *assumpsit*.

KNIGHT
against
RUSHWORTH.

Cro. Jac. 381.
1. Mod. 166.
Sid. 283.
Raym. 153.
Keb. 26. 44.

pretending that this bond was read to the said *Mary Rushworth* as an obligation of 100l. only and so void, assumed to the plaintiff, that if he and two witnesses would *deponere* before the mayor of *Lincoln*, that the obligation was read to *Mary Rushworth* as an obligation of 200l. that he would pay it. Whereupon the plaintiff, with two others, came before the mayor of *Lincoln*, and there deposed upon a book accordingly; and hereupon brought this action. Whereto it was demurred.—YELVERTON, for the defendant, moved, that this action lies not; for there is not any consideration besides this oath, which is unlawful, and therefore void.—HEARN. It is not material whether the consideration be for the plaintiff's benefit; for if it be any charge or trouble to the defendant, it sufficeth; as in *Albanie's Case*; and he conceived the oath to be lawful enough, he being before the mayor, not only by his authority, but before him also as a witness. And 2. *Hen. 4.* and *N. B. R.* are, that if a *feme* swears that she will not sue a *cui in vita*, the oath is not unlawful, and she might be sued *pro læsione fidei* in this case in the spiritual court; but because the matter is merely temporal, the temporal court will grant a prohibition, which allows that the oath is lawful.—ANDERSON. The travail of coming before the mayor is a very good consideration; and truly the oath is not illegal, being taken before him; and the smallness of a consideration is not material, if there be any: and the case cited of 2. *Hen. 4.* proves that the oath is not illegal; for the spiritual court ought not to meddle therewith, being temporal. But if a woman swears to marry such a one, and she be sued in court christian *pro læsione fidei*, the suit is lawful, and no prohibition lies in that case; and if one takes an oath before arbitrators in the country voluntarily, which have no authority to take an oath, it hath been punished in the star-chamber, being false, for its falsity.—WALMSLEY accord. For oaths are in two manners, *viz.* by compulsion, as before judges who have authority to take an oath, or voluntarily by consent of the party, which is also lawful; as 10. *Edw. 4.* 11. The condition of an obligation was to prove such a thing before *J. S.* it is not to be doubted but that there it may well be by oath before *J. S.*; and the oath being taken voluntarily and without compulsion is lawful enough. And whereas it was objected that the word being *deponere* before the mayor, is a word incertain, for *deponere* is to lay down: but it was held certain enough; for to depose or lay down are in truth *synonima's et tantamout*.—BEAUMOND and OWEN doubted herein at first; but afterwards they agreed with their companions, that the consideration was sufficient and lawful.—Wherefore it was adjudged for the plaintiff.

Ld. Raym. 500.
1. Term Rep.
B. R. 65.

CASE 22.

Matthewson against Lydiate.

Ante, Page 408. Case 20.

Where several enter into covenants by the same deed, and the seal of one of the covenantors is torn off, yet it shall not discharge the others.
Ante, 468.
Post. 546.

THE case was now revived again upon a new action brought, and the matter pleaded in bar as before; and a demurrer thereupon.—GLANVILLE moved, that it was a several-deed; for every one covenanted by himself that the one should pay, &c. and that the other should pay, &c. and therefore it is as several deeds in one piece of parchment; and in that regard, although the deed of the one be discharged by the breaking off the seal, yet it remains the deed of the other.—WARBERTON. Although the first words have a covenant *separatim*, yet in the end is this clause, *et ad performandum omnes conventiones prædictæ*; every of them

2. Lev. 220. 5. Co. 23. 56. 1. Salk. 52. 53. 2. Salk. 574. Bull. N.P. 268. 5. Com. Dig. 232.

separatim bound himself in a double freight, wherein every of them bound himself that the covenants of his companions and his own should be performed, which is joint in itself.—WALMSLEY and BEAUMOND. The covenant is, that every one binds himself *ad performance omnium conventionum mercatorum prædictor*; the which extends to every of them, *redd* ^{1. singula singulis, viz.} to perform his own covenants.—ANDERSON. I doubt much thereof, for in the premises it is a joint deed; as for a joint demise by joint lessors to joint lessees; and the covenants are in words several; so as if the one had released the covenants to the one of the lessees, that had not discharged the others, for their covenants are several. But if a discharge of the deed of the one be a discharge for all, I doubt much.—Wherefore the Court moved the parties to compound (a).

MATHEWSON
against
LYDIATE.

(a) It was
moved again,
and adjudged
for the plaintiff,
post. 546.

Further against Further, and Others.

CASE 23.

DEBT upon an obligation against F. and three others, administrators of J. S. who pleaded, that one J. D. had brought debt in the queen's bench upon an obligation of one hundred pounds against one of the administrators, and recovered by a *nihil dicit*; and that they had *riens in ses maynes* to satisfy over and above the said debt: and it was thereupon demurred.—GLANVILLE moved, that this was not any plea; for in regard the defendant in the first action might have abated the bill by saying that he had co-administrators not named, this recovery shall not bind any stranger: this recovery is also covinous, being by default; and in proof thereof *vide* 9. Edw. 4. pl. 12.—ANDERSON and BEAUMOND held, that it was a good plea *primâ facie*; for a stranger cannot falsify a recovery by reason of joint-tenancy or non-tenancy, or by such dilatories, but only for matter of substance; and if the recovery be for a true debt, it is not reason but that the administrator might suffer it to pass by default; and it is reason it should be allowed to all the others: and if there be any covin, it is to be averred by the plaintiff; for *primâ facie* it shall not be so intended, but that it is true; and if there be any covin in it, he may falsify it for that cause; and a recovery against one administrator shall bind him and all his companions; and therefore it is reason it should bind all strangers. And of that opinion OWEN and WALMSLEY said they were: but they would be advised, &c.

A recovery against one administrator shall bind all; and may be pleaded with no assets *ultra* to an action for another debt of the intestate's.

Ante, 41. 426.

1. Lev. 261.

W. Jones, 91.

1. Sid. 404. 334.

Strange, 409.

Vaugh. 95. 100.

Vent. 199.

Stapleton's Case.

CASE 24.

DREW moved the Court, that one Stapleton of Yorkshire being tenant in tail, covenanted to stand seised, in consideration of the marriage of his eldest son, to the use of himself for life, and after to the use of his eldest son for his life, and after to the use of the first son of his eldest son, which should be in tail; and that afterwards the eldest son had issue one Gilbert Stapleton his eldest son. The grandfather afterwards upon great cause would sell part of the land, and assure more in recompence to the son, and the purchasers would not take any assurance unless the infant (who was but four years of age) would suffer a recovery; and yet it was conceived that the covenant did not alter any estate;

Tenant in tail covenants to stand seised to the use of himself for life, remainder to his son in tail; this does not make any alteration in his estate; but he remains tenant in tail as before.

Ante, 279, 280. Post. 895.

Moor, 32. Yelv. 51. 2. Co. 52. Salk. 619. Com. Rep. 119. 3. Peere Will. 229.

and

STAPLETON'S CASE. and so it was adjudged in this court, in the case of *Blythman v. Blythman*. *Quod* WALMSLEY, BEAUMOND, et OWEN *concefferunt*.

But yet to satisfy the purchaser he prayed, that a guardian might be allowed to that infant, that a recovery might be suffered against him as vouchee.—Whereunto THE COURT agreed; and therefore admitted two gentlemen there present (the infant being brought into court) to be guardians for him; and then a recovery was had of that land at the bar, wherein the infant was vouched; and he by his guardian appeared and vouched the common vouchee. recovery in order to satisfy a purchaser. Ante, 172. Hob. 197. Cro. Car. 307.

CASE 25.

Byron against Byron.

Debts by specialty are the deceased's goods in that diocese where they happen to be at the time of his death.

1. Roll. Ab. 908.
2. Swinb. 357.
3. Lev. 78.
4. Sound. 274.
5. Sid. 90.
6. Inst. 335.
7. Latch. 85.
8. Lev. 86.
9. Harl. 216.
10. Bull. 4.
11. Salk. 39.
12. Garth. 374.
13. Godol. 70.
14. Went. 46.

DEBT as administrator of *Byron* upon an obligation. The case was, That the intestate died in *Lancashire*, but the obligation was at *London* at the time of his death; and the bishop of *Chester*, in whose diocese the intestate died, committed administration to *J. S.* who released to the defendant; and the archbishop of *Canterbury* committed the administration to the plaintiff: and this release was pleaded in bar, and it was thereupon demurred.—**WARBERTON.** Every debt follows the person of the debtee; and *Chester* is within the province of *York*, where the archbishop of *Canterbury* hath nothing to do.—**ANDERSON.** Where one dies who hath goods in divers dioceses in both provinces, there *Canterbury* shall have the prerogative; otherwise there would be two administrations committed, which is *res inaudita*. The debt is where the bond is, being upon a specialty; but debt upon a contract follows the person of the debtor; and this difference hath been oftentimes agreed. *Vide Dyer*, 305. And if the archbishop of *Canterbury* hath not any prerogative in *York*, but that several administrations ought to be committed; yet at leastwise administration for this bond ought to be committed by the archbishop of *Canterbury*. Wherefore this release is not any bar.

CASE 26.

Frampton against Stiles.

If an indenture be pleaded as an indenture, a deed indented must be shewn.

S. C. 5. 6. 20. b.
Co. Lit. 145, b.
229. a. 2. Roll. Abr. 27.

DEBT upon an obligation conditioned for the performance of certain covenants, in *quâdam indenturâ hic in curiâ prolata*. In truth the deed was not indented; but it was written *hec indentura facta per Curiam*: and it is not any indenture, although there be two parts thereof.—Wherefore, because the defendant did not shew an indenture by him pleaded, it was adjudged for the plaintiff.

2. Inst. 261. 2. Brownl. 291. Cro. Jac. 429. 1. Roll. Rep. 408.
Dyer, 27. 3. Sac. Abr. 336. 1. Salk. 76.

CASE 27.

Anonymous.

If the husband of a feme executrix detain part only of the testator's goods, he is an executor *de son tort*. Ante, 406. Post. 410.

DEBT against the defendant as executor. He pleaded, *ne nunques executor*, &c. and a special verdict found, that administration of the goods of the testator was committed to the wife of the defendant, who is dead; and that he kept *bonam partem bonorum* in his hands, and sold them.—**WILLIAMS** moved that this verdict was void for the uncertainty; for *bonam partem* is altogether uncertain.—But it was held to be well enough; for if he detain any part, it makes him executor *de son tort*, &c. Wherefore it was adjudged for the plaintiff.

5. Co. 33.
Dyer, 105. 166. 255. Moor, 14. Noy, 69. Gouldf. 116. 2. Vern. 147. 2. Term Rep. 97. 587. 597.

